TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 174.

FRANK H. PIERCE, PETITIONER,

vs.

THE TENNESSEE COAL, IRON AND RAILROAD COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITION FOR CERTIORARI FILED OCTOBER 9, 1908.
CERTIORARI AND RETURN FILED DECEMBER 10, 1908.

(16,682.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 11, 1898.

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No. .....

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT.

..... Term, ...

TRANSCRIPT OF RECORD.

TENNESSEE COAL, IRON & RAILROAD COMPANY,
Plaintiff in Error,

vs.

FRANK H. PIERCE,
Defendant in Error,

FRANK H. PIERCE,
Plaintiff in Error,

vs.

TENNESSEE COAL, IRON & RAILROAD COMPANY,
Defendant in Error.

In Error to the Circuit Court of the United States for the Northern District of Alabama, Southern Division.

FILED..... .....1897.

PETITION TO REMOVE CAUSE TO CIRCUIT COURT OF THE UNITED STATES.

In the Circuit Court of the United States for the Southern Division of the Northern District of Alabama.

Frank Pierce

vs.

Tennessee Coal, Iron & Railroad Company.

To the Honorable Judges of the Circuit Court of the United States, for the Southern Division of the Northern District of Alabama:

Your petitioner, the Tennessee Coal, Iron & Railroad Company, a corporation, respectfully shows that it is the defendant in a certain suit which was instituted by the said Frank Pierce against the petitioner, the Tennessee Coal, Iron & Railroad Company, a corporation, in the Circuit Court of Jefferson county on the 22d day of January, 1892.

That said suit has not been tried but is now pending for trial in the said Circuit Court of Jefferson county, Alabama, and that petitioner desires to remove the same in and to the Circuit Court of the United States for the Southern Division of the Northern District of Alabama.

Your petitioner further states and alleges that in the said above mentioned suit, there is a controversy between the plaintiff, a citizen of the State of Alabama, in which said suit has been instituted, and a citizen of another state, to-wit, the State of Tennessee. Petitioner states that

at the time of the commencement of said suit the said plaintiff was and still is a citizen of the State of Alabama, and a resident of said State. That your petitioner against whom said suit was brought, was at the time of the institution thereof, and is now a citizen of the State of Tennessee, and is a corporation organized and existing under the laws of the State of Tennessee, and is a non-resident of the State of Alabama. Your petitioner further states that through prejudice and local influence, your petitioner will not be able to obtain justice in said Court, that is to say, the Circuit Court of Jefferson county, Alabama, or in any other State Court, to which your petitioner may, under the laws of said State have the right, on account of such prejudice and local influence, to remove said cause. That said suit was brought for the recovery of damages for the breach of a contract of employment made in settlement of a claim for personal injuries received by the plaintiff while in the employ of the defendant corporation, and claims as such damages the sum of fifty thousand dollars. That the amount in dispute or controversy in said suit exceeds in value the sum of $2,000 exclusive of costs and interest.

Your petitioner further states that it has filed herewith affidavits of the truth of this petition, and of the fact that your petitioner, on account of prejudice and local influence, will not be able to obtain justice in said City Court or any other court to which your petitioner may, under the laws of said State, have the right, on account of such prejudice and local influence, to remove said cause.

Your petitioner therefore prays that the said affidavits may be accepted as good and sufficient, and that the said suit may be moved in said Circuit Court of the United States for the Southern Division of the Northern District of Alabama, and to the end also that said removal may be perfected; that such order be made in the premises as the nature of the case may require.

WALKER PERCY,
Attorney for Petitioner.

United States of America, Southern Division of the Northern District of Alabama—

Before me, W. I. Grubb, a Notary Public in and for said county and State, personally appeared Walker Percy, who being duly sworn deposes and says that he is one of the attorneys for the petitioner in the above entitled cause; that he has read the foregoing petition and knows the contents thereof, and that the statements and allegations therein contained are true as affiant verily believes.

WALKER PERCY.

Sworn to and subscribed before me this the —— day of March, 1896.

W. I. GRUBB,
Notary Public.

[Endorsed.]
Filed March 23, 1896.
N. W. TRIMBLE, Clerk.

AFFIDAVIT OF P. J. ROGERS.

In the Circuit Court of the United States for the Southern Division of the Northern District of Alabama.

Frank Pierce

vs.

Tennessee Coal, Iron & Railroad Company.

United States of America, Southern Division of the Northern District of the State of Alabama—

Before me, the undersigned, a Notary Public in and for said county, in said State, personally appeared P. J. Rogers, who being first duly sworn, deposes and says, that he is superintendent of the defendant, the Tennessee Coal,

Iron and Railway Company, at Pratt City, Alabama, and has been such superintendent for three months, and has been a resident of Jefferson county, Alabama, for sixteen years, and has been in the employ of the defendant corporation and its predecessors in said county and State for fifteen years; affiant says that he makes this affidavit for and on behalf of the said Tennessee Coal, Iron and Railroad Company, defendant herein, and that he is authorized to make this affidavit on its behalf; affiant says that he is familiar with the sentiment existing in regard to corporations in the county of Jefferson and State of Alabama, and in its vicinity; that he has traveled over all the counties in this State in connections with his business for the last eight years; that he knows the general sentiment prevailing with regard to suits against corporations by individuals resident of the State of Alabama, in said county of Jefferson and vicinity; that there is a very general feeling of prejudice now existing against corporations in the said county and its vicinity in such suits, especially in suits arising out of personal injuries, received by employes of corporations, whether such cases involve such injuries, either directly or indirectly; that such feeling of prejudice manifests itself in the excessive verdicts rendered in cases of this character in said county and its vicinity; that recently in the adjoining county of Walker, in a personal injury suit for the death of a passenger, a jury rendered a verdict against a railroad corporation for $44,000, which the trial Court set aside as excessive; that other large verdicts have been rendered in suits of this character; and that there is a very general sentiment among a large class of the people of said county and vicinity against corporations; that there is now in progress a political campaign in which a Governor and members of the State Legislature are canvassing the State for nomination; that one of the issues of said campaign is the so-called anti-commissary and two-weeks' pay bill laws; that the purpose of these laws is to prevent corporations from operating commissaries or company stores in connec-

tion with their ordinary business, and to compel corporations who are employers of labor to pay their labor every two weeks, and that a great deal of anti-corporation sentiment has been stirred up because of the stirring up of these issues; that great hostility has arisen to all corporations, and especially to such corporations as are engaged in carrying on commissaries in connection with their general business, as your petitioner is; that candidates for the State Senate and House of Representatives are running distinctly on this issue; and that the sentiment of the people is very much stirred up over these questions, and that such sentiment will prejudice a large class of the citizens of said county and adjoining counties, such as Walker and Bibb, against this petitioner; and affiant says that on account of the prejudice and local influence against said defendant, the Tennessee Coal, Iron & Railroad Company, your petitioner will not be able to obtain justice in the said Circuit Court of Jefferson county, Alabama, or any other State Court to which said defendant may under the laws of said State have the right, on account of such prejudice and local influence, to remove said cause.

P. J. ROGERS.

Sworn to and subscribed before me this 23d day of March, 1896.

W. I. GRUBB,
Notary Public.

[Endorsed,]
Filed March 23, 1896.
N. W. TRIMBLE, Clerk.

MARCH TERM, 1896.

Pleas had at a regular term of the Circuit Court of the United States for the Southern Division of the Northern

District of Alabama, begun and held at the city of Birmingham in the United States Court Room in said division of said district, the first Monday of March, it being the second day thereof, in the year of our Lord one thousand eight hundred and ninety-six, and of the independence of the United States of America the one hundred and twentieth year: Present the Hon. John Bruce, Judge of the District Court of the United States for the Northern and Middle Districts of Alabama, sitting and presiding as Circuit Judge; Emmet O'Neal, United States Attorney; J. C. Musgrove, United States Marshal and N. W. Trimble, Clerk.

* * * * * * *

MONDAY MORNING MARCH 23, 1896.

Frank H. Pierce

vs.

Tennessee Coal, Iron & Railroad Company.

249.

Upon consideration of the application and petition and writing of defendant in the above entitled cause, and the affidavits admitted in support thereof, to remove said cause from the Circuit Court of Jefferson county, Alabama, to this Court on account of prejudice and local influence, it is considered that said application be granted and the said cause be and is hereby removed to this Court from the Circuit Court of Jefferson county, State of Alabama.

The Clerk will issue a writ of certiorari to the Clerk of the said Circuit Court of Jefferson county, Alabama, for a certified transcript of the proceedings in said cause.

(Signed) JOHN BRUCE, Judge.

[Endorsed.]

Filed March 23, 1896.

N. W. TRIMBLE, Clerk.

CERTIORARI.

In the Circuit Court of the United States for the Southern Division of the Northern District of Alabama.

Frank Pierce

vs.

Tennessee Coal, Iron & Railroad Company.

The President of the United States of America, to the Clerk of the Circuit Court of Jefferson County, State of Alabama—Greeting:

Whereas, it has been represented and shown to the Circuit Court of the United States for the Southern Division of the Northern District of Alabama, that a certain suit was commenced in the Circuit Court of Jefferson county, Alabama, wherein Frank Pierce, a citizen of the State of Alabama, was plaintiff, and the Tennessee Coal, Iron and Railroad Company, a body corporate, organized and existing under the laws of the State of Tennessee, and a citizen of said State, was defendant, on the 22d day of January, 1892; and

Whereas, a proper petition supported by proper affidavits has been filed in this Court, to remove the same to this Court, on the ground that from prejudice and local influence the said defendant will not be able to obtain justice in said Court, or any other State Court to which the petitioner may under the laws of said State, have the right on account of such prejudice and local influence, to remove said cause.

Now, therefore, these are to command you, that you forthwith certify, or cause to be certified, to the said Circuit Court of the United States for the Southern Division of the Northern District of Alabama, a full, true and complete copy of the record of pleadings in said cause, in which the said petition for removal was filed aforesaid, plainly

and distinctly, and in as full and ample a manner as the same now remains before you, together with this writ, so that the said Circuit Court may be able to proceed thereon, and do what to them shall appear of right ought to be. Herein fail not.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United [SEAL] States, and the seal of said Circuit Court hereto affixed, this the 23d day of March, A. D. 1896.

N. W. TRIMBLE, Clerk.

[Endorsed.]

Marshal's Return.

Birmingham, Ala., March 24, 1896.

Executed by serving a copy of the within Certiorari on the Circuit Clerk of Jefferson county, Alabama.

J. C. MUSGROVE, Marshal.

JOHN R. PERKINS, Deputy.

[Endorsed.]

Filed in Clerk's office March 25th, 1896.

N. W. TRIMBLE, Clerk.

RECORD FROM CIRCUIT COURT OF JEFFERSON COUNTY.

Summons and Complaint.

THE STATE OF ALABAMA, Jefferson County. } Circuit Court.

To any Sheriff of the State of Alabama—Greeting:

You are hereby commanded to summon the Tennessee Coal, Iron & Railway Company, to appear before the Cir-

cuit Court to be held for said county, at the place of holding the same within thirty days from service of this process, then and there to answer the complaint of Frank H. Pierce.

Witness my hand the 22d day of January, 1892.

FERGUS W. MCCARTHY, Clerk.

STATE OF ALABAMA, Jefferson County. } In the Circuit Court of Alabama for said County.

Frank H. Pierce, Plaintiff,

vs.

The Tennessee Coal, Iron & R. R. Co., a corporation, Defendant.

The plaintiff claims of the defendant, a body corporate, incorporated under the laws of the State of Tennessee, and resident and doing business in said State of Alabama, county of Jefferson, the sum of fifty thousand dollars, as damages for the breach of a certain contract in writing entered into between the plaintiff and defendant by its agent, in substantially the words and figures following, to-wit: 4th of June, 1890, whereas, I, F. H. Pierce, while in the employ of the Tennessee Coal, Iron & Railway Company, Pratt Mines Division, as a machinist, was seriously hurt by a trip of tram cars on the main slope of the mine, known as Slope No. 2, and operated by the Tennessee Coal, Iron & Railroad Company, under circumstances which I claim render the said Company liable to me for damages, but, whereas, they disclaim any liability for said accident or injuries to me resulting from same, and both parties being desirous of settling and compromising said matter; and whereas, the said Tennessee Coal, Iron & Railroad Company did make me a proposition on the——day of November, 1888, said accident having occurred on the 21st day of May, 1888, that they would furnish me such supplies from the com-

missary at No. 2 prison, as I might choose to take; pay me regular wages while I was disabled, and give me my coal and wood for fuel at my dwelling, and the benefit of the convict garden at No. 2; and whereas said proposition was accepted by me and carried out by the said Company; and, whereas, in May, 1889, after I had resumed work, a further proposition was made to give me work, such as I could do, paying me therefor the wages paid me before said accident, that is $60 a month, and in addition free house rent; and, whereas, said agreement has been faithfully kept by both parties; and, whereas, on the 4th day of June, 1890, it is mutually agreed between myself and the said Company that it will be better to give me the house rent than the supplies of about equal amount from the commissary. Now, therefore, it is agreed that in view of the above propositions which have been faithfully carried out; that my wages from this date are to be $65 per month, and, in addition I am to have free of charge, my coal and wood necessary for my household use at my dwelling, and the same benefit from the garden as is had by others who are allowed the garden privilege, and I, on my part, agree and bind myself, to release the said company from any and all liability for said accident, or from injuries resulting to me from it, or the effects of it, and agree that this is to be a full and satisfactory settlement of any and all claims which I might have against said Company.

F. H. PIERCE,
G. B. MCCORMACK.

WITNESSES—
P. J. Rogers,
Erskine Ramsey.

And plaintiff avers that in and by said agreement, the said defendant, for the consideration therein mentioned, became liable to pay to the plaintiff monthly during his life the wages stipulated therein, to be paid to him monthly, to-wit, the sum of sixty-five dollars, and to fur-

nish him at his dwelling, free of charge, the coal and wood necessary for his household use, and to allow him the same benefit from the garden of the said defendant as is had by others, who are allowed the garden privilege; and plaintiff avers that others then had, and since have had, the free use of the Garden of said defendant for vegetables for domestic use, and that this privilege is worth the sum of five dollars per month; and plaintiff avers that he has at all times been ready and willing and offered to do for said defendant such work given to him to do as he was able to do, and that he has labored at the same for such reasonable time as he was able to work and bound to work under said contract.

And plaintiff avers that by the injuries received by him from said accident mentioned in said contract, he was permanently disabled in the use of his legs and hands, and that he was so otherwise injured thereby that his strength and health is such that he is incapacitated to reasonably do more work for the said defendant than he has done and offered to do since the said contract was entered into. And that he has at all times since the said contract was entered into fully carried out and performed the stipulations on his part to be done and performed. But the plaintiff avers that the said defendant has, without any reasonable ground for so doing, abandoned said contract and refused to carry the same out, claiming that there is no obligation upon it to pay plaintiff the wages therein stipulated to be paid longer than it suits its pleasure to do so, and accordingly said defendant has wholly neglected and refused to be governed by the terms of said contract, and has failed and refused to pay plaintiff the sum of sixty-five dollars for six months last past, before the commencement of this suit, and has failed and refused to furnish the defendant at his dwelling the coal and wood necessary for his household use for the same period, and plaintiff avers that the value of the coal and owod necessary for his household use is worth the sum of five dollars per month, and that said defendant has wholly

and purposely disregarded and refused to abide by the obligations of said contract, for the said period of six months last past, before the commencement of this suit, and has wholly and entirely abandoned said contract, and discharged the plaintiff from its service.

Wherefore, the said defendant became liable to pay to the plaintiff his reasonable damages, which plaintiff avers was and is the sum of fifty thousand dollars for its breach and abandonment of the stipulations of the said contract above set out, and being so liable, and in consideration thereof, the said defendant promised to plaintiff, on, to-wit, the first day of February, 1891, to pay plaintiff the sum of fifty thousand dollars, but though often requested so to do, has hitherto neglected and refused, and still neglects and refuses to pay the same, to the damage of the plaintiff fifty thousand dollars, for which he sues.

F. S. FERGUSON,
BRICKELL, GUNTER & SEMPLE,
Plaintiff's Attorneys.

The plaintiff demands a trial by a jury in the above stated cause.

F. S. FERGUSON,
BRICKELL, GUNTER & SEMPLE,
Plaintiff's Attorneys.

[Endorsed.]

Filed in office this 22d day of January, 1892.

FERGUS W. MCCARTHY, Clerk.

[Sheriff's Return.]

Received in office this 22d day of January, 1892.

J. S. SMITH, Sheriff.

Executed this 1st day of February, 1892, by leaving a copy of the within summons and complaint with J. G. Moore, assistant superintendent of the Tennessee Coal, Iron and Railway Company, defendant.

J. S. SMITH, Sheriff.

By J. E. BLACKWELL, Deputy Sheriff.

DEMURRER.

Frank H. Pierce

vs.

The Tennessee Coal, Iron & Railroad Co.

Circuit Court of Jefferson County.

Defendant demurs to plaintiffs complaint, and assigns the following grounds of demurrer:

1. Because said complaint purports to set out in haec verba the contract relied upon, and it appears from the terms of said contract that said contract was a contract of hiring, terminable at the will of either party to said contract, and not a contract of hiring for life as averred by plaintiff, and it appears from the averments of plaintiff's complaint that defendant in terminating the contract of hiring has only exercised its legal right under the contract.

2. Because said complaint purporting to set out in haec verba the contract sued upon, it appears from said contract, that said contract was a contract of monthly hiring, and there is no averment to the complaint to show that plaintiff was discharged at any other time than the end of the month.

3. Because it appears from the contract set out and sued upon that the defendant was to pay plaintiff sixty-five dollars a month and furnish plaintiff with a house and supplies only so long as plaintiff remained in the service of defendant, and it nowhere appears where defendant failed to pay plaintiff, so long as plaintiff was retained in the service.

4. Because the contract sued upon being set out in the complaint in haec verba with the signatures thereto, it does not appear that the Tennessee Coal, Iron & Railway Company was a party to said contract or bound by it.

5. Because the contract sued upon being set out in the complaint in haec verba with the signatures thereto, it appears that the only parties to said contract were plaintiff and G. B. McCormack, and it does not appear that G. B. McCormack had authority to bind defendant to said contract or intended to bind said defendant by said contract.

6. Because the averments of plaintiff's complaint, considered in connection with the contract sued upon, failed to show that the act of McCormack in signing said contract made defendant a party to said contract or bound by it.

R. H. PEARSON,
WALKER PERCY,
Attorneys for Defendant.

Filed January 29, 1894.

FERGUS W. MCCARTHY, Clerk.

JUDGMENT ENTRY.

Frank H. Pierce

vs.

Tennessee Coal, Iron & Railroad Company.

On this the 29th day of January, 1894, come the parties by their attorneys, and this cause coming on to be heard, the defendant is allowed to withdraw pleas and file demurrers to the complaint, and the demurrer to the complaint sustained by the Court, plaintiff declining to amend his complaint, the Court rendered judgment in favor of the defendant.

It is therefore considered by the Court that the defendant have and recover of the plaintiff all the costs in this behalf expended, which execution may issue.

APPEAL BOND.

Frank H. Pierce

vs.

Tennessee Coal, Iron & Railroad Company.

In Circuit Court.

We hereby acknowledge ourselves security for costs of appeal in this cause, returnable to the present term of the Supreme Court of Alabama; also waive all right to claim of exemptions as against this obligation.

FRANK H. PIERCE,
By ROBERT C. REDUS,
His Attorney in Fact.
ROBERT C. REDUS,
J. R. CARTER.

Approved February 21, 1894.
FERGUS W. MCCARTHY, Clerk.
Filed February 21, 1894.
FERGUS W. MCCARTHY, Clerk.

CITATION.

THE STATE OF ALABAMA, Jefferson County. } Circuit Court.

To Tennessee Coal, Iron & Railroad Company, or R. H. Pearson, Walker Percy, Attorneys—Greeting:

Whereas Frank H. Pierce has taken an appeal from the judgment by the Circuit Court for the county of Jefferson, State of Alabama, in the cause of Frank H. Pierce against Tennessee Coal, Iron & Railroad Company;

Now you are therefore cited to appear at the present

term of the Supreme Court of Alabama, to defend on said appeal, if you shall think proper so to do.

Witness the 21st day of February, 1894.

FERGUS W. McCARTHY, Clerk.

We accept service of the within notice and waive copy of same February 21, 1894.

WALKER PERCY,
Attorney for Defendant.

CERTIFICATE OF APPEAL.

THE STATE OF ALABAMA,
Circuit Court of Jefferson County.

I, Fergus W. McCarthy, Clerk of the Circuit Court of Jefferson county, Alabama, do hereby certify that the foregoing pages, from one to seventeen inclusive, contain a full and complete transcript of the record and proceedings of the said Circuit Court in a cause therein pending, wherein Frank H. Pierce is plaintiff, and Tennessee Coal, Iron & Railroad Company is defendant; that the said Frank H. Pierce did on the 21st day of February, 1894, after giving security for costs, obtain an appeal to the present term, 1894, of the Supreme Court of Alabama, and that Robert Redus and J. R. Carter are the sureties for the said costs; all of which I hereby certify to said Supreme Court.

Witness my hand this 21st day of February, 1894.

FERGUS W. McCARTHY, Clerk.

CERTIFICATE.

THE STATE OF ALABAMA,
Circuit Court of Jefferson County.

I, Fergus W. McCarthy, Clerk of the Circuit Court of

Jefferson county, Alabama, do hereby certify that the foregoing pages, from one to ten inclusive, contain a full and complete transcript of the record and proceedings of said Circuit Court in a cause therein pending, wherein Frank H. Pierce is plaintiff, and the Tennessee Coal, Iron & Railroad Company, is defendant.

Witness my hand and seal of office this the 28th day of March, 1896.

FERGUS W. MCCARTHY,
Clerk of the Circuit Court of Jefferson County.

[Endorsed.]
Filed March 28, 1896.
N. W. TRIMBLE, Clerk.

MONDAY MORNING, MARCH 30, 1896.

Frank Pierce

vs.

Tennessee Coal, Iron & Railroad Company.

249.

This cause coming on to be heard on the motion of the plaintiff to remand said cause back to the Circuit Court of Jefferson County, Alabama, and after being argued by counsel pro and con, was submitted to the Court for its consideration.

Frank H. Pierce

vs.

Tennessee Coal, Iron & Railroad Company.

249.

This cause having heretofore been argued by counsel

pro and con and submitted to the Court upon motion of the plaintiff to remand the said cause back to the said Circuit Court of Jefferson County, Ala., and now after due consideration thereof by the Court, it is ordered that the said motion be and the same is hereby denied and overruled.

AGREEMENT OF COUNSEL.

Frank H. Pierce

vs.

Tennessee Coal, Iron & Railroad Company.

In this case it is agreed that the same may be set down peremptorily for trial on Monday, January 4, 1897, at Huntsville, Ala.

The signatures to the contract sued on are admitted to be genuine.

December 23, 1896.

W. A. GUNTER,
R. C. REDUS,
For Plaintiff.
WALKER PERCY,
For Defendant.

[Endorsed.]
Filed December 27, 1896.
N. W. TRIMBLE, Clerk.

SEPTEMBER TERM, 1896.

Present Hon. Aleck Boarman, Judge of the District

Court of the United States for the Western District of Louisiana, sitting and presiding as Circuit Judge.

THURSDAY MORNING DECEMBER 17th, 1896.

Frank H. Pierce

vs.

Tennessee Coal, Iron & Railroad Co.

249.

It is ordered that this cause be set down for hearing for next Tuesday the 22d day of December.

WEDNESDAY MORNING DECEMBER 23d, 1896.

Frank H. Pierce

vs.

Tennessee Coal, Iron & Railroad Co.

249.

Come the parties by their attorneys and in open court agree that this cause may be continued for trial at Huntsville, Alabama, before the Hon. Aleck Boarman, presiding Judge, on the first day of the adjourned October term, 1896, of the United States Circuit Court for the Northern Division of the Northern District of Alabama to be held on December 30th, 1896, or any day subsequent thereto on which said cause may be tried to meet the convenience of the Court or the parties interested therein, and that the result of said trial shall become and be the judgment of

this Court the same as if said trial had taken place in the United States Court Room in Birmingham, Alabama.

It is therefore ordered by the Court that this cause be and the same is hereby set down for trial at Huntsville, Alabama, on Wednesday, December 30th, 1896, or on such day thereafter as soon as said cause may be reached for trial, or on such day as may be agreed upon by counsel for both parties, as may meet with the approval and consent of the Court, and that the result of said trial and the judgment thereon shall be entered and recorded in the office of the Clerk at Birmingham, Alabama.

DEFENDANT'S PLEAS.

In the Circuit Court of the United States for Southern Division of the Northern District of Alabama.

Frank H. Pierce

vs.

Tennessee Coal, Iron & Railroad Company.

Pleas of Defendant.

1. The defendant for answer to the complaint, says that it denies each and every allegation therein contained.

2. The defendant for further answer to the complaint, says that the plaintiff under and by the terms of the contract set out in the complaint, contracted to perform for the defendant during the term thereof such service as he was able to perform in consideration for the promises made by defendant therein, and the defendant avers that the plaintiff thereafter became able to perform service for the defendant, and did in fact perform such service for some time thereafter; and that while engaged in the performance of

such service, the plaintiff voluntarily and without excuse therefor refused to further perform such service as he was able to perform, and was in fact performing for the defendant, as required by said contract, and the defendant thereupon discharged the plaintiff from its service; and the defendant avers that the plaintiff failed to comply with the conditions imposed upon him by said contract.

3. The defendant for further answer to the complaint, says that the contract upon which this action is founded is not executed by it or any one authorized by it to bind it in the premises, and defendant makes oath that this plea is true.

WALKER PERCY,
W. I. GRUBB,
Attorneys for Defendant.

STATE OF ALABAMA, }
Jefferson County. }

Before me, the undersigned, a Notary Public in and for said county in said State, personally appeared Walker Percy, who being duly sworn, deposes and says that he is attorney of defendant, and authorized for it to make this affidavit, and that the facts stated in Plea No. 3 are true.

WALKER PERCY.

W. I. GRUBB,
Notary Public.

[Endorsed.]
Filed in Clerk's office January 4, 1897.
N. W. TRIMBLE, Clerk.

AMENDMENT TO COMPLAINT.

Plaintiff amended his complaint as follows by inserting in the contract as set out after the words, "After I had

resumed work a further proposition was made to give me work, such as I could do paying me therefor the wages paid me before said accident, that is $60 a month and in addition free house rent," the following words, "or in lieu of house rent, a certain amount of supplies from the convict commissary at No. 2 prison which supplies were to amount to about the sum paid by me for house rent," the words so inserted immediately preceding the words "and whereas said agreement."

[Endorsed.]

Filed January 4, 1897.
N. W. TRIMBLE, Clerk.

DEMURRER TO SECOND PLEA.

In the Circuit Court of the United States at Huntsville.

Frank H. Pierce

vs.

Tennessee Coal & Iron Co.

1. The plaintiff joins issue on the first plea of defendant.

2. As to the second plea defendant demurs thereto and for grounds of demurrer assigns:

1. That said plea does not go to the whole consideration of the contract and is no answer to the entire action.

3. As to the third plea plaintiff takes issue thereon.

W. A. GUNTER
and ROBERT C. REDUS,
For Plaintiff.

[Endorsed.]

Filed in Clerk's Office January 4, 1897.
N. W. TRIMBLE,
Clerk U. S. Circuit Court.

PLEA NO. 4.

In the Circuit Court of the United States.

F. H. Pierce

vs.

T. C., I. R. R. Co.

The defendant for further answer to the complaint, and by way of recoupment, says that the plaintiff under and by the terms of the contract sued on in the complaint, contracted to perform for the defendant during the term thereof such service as he was able to perform in consideration for the promises made by defendant therein, and the defendant avers that the plaintiff thereafter became able to perform service for the defendant, and did in fact perform such service for some time thereafter; and that while engaged in the performance of such service for some time thereafter, to-wit, on May 3d, 1891, the plaintiff voluntarily, and without excuse therefor, refused to perform such service as he was able to perform, and was in fact performing for the defendant, as required by said contract; and has since continued to refuse to perform such service, and has not in fact since such time performed such services, or any part thereof, to the damage of the defendant in the sum of fifty thousand dollars, which defendant offers to recoup against the claim of plaintiff, and asks judgment for the excess.

WALKER PERCY,
W. I. GRUBB,
Attorneys for Defendant.

[Endorsed.]
Filed in Clerk's office January 4, 1897.
N. W. TRIMBLE, Clerk.

MONDAY MORNING JANUARY 4th, 1897.

Frank H. Pierce

vs.

Tennessee Coal, Iron & Railroad Co.

249.

This cause coming on to be heard on the demurrers of the defendant to the plaintiff's complaint, and the same being argued by counsel and duly considered by the Court.

It is ordered that the same be overruled and denied and thereupon by leave of the Court the plaintiff in open Court files an amended complaint, as appears from separate paper this day filed.

And said cause coming on further to be heard on the demurrers of the defendant to the amended complaint, and the same being argued by counsel and duly considered by the Court, it is ordered that said demurrers be overruled and denied.

And said cause coming on further to be heard upon the demurrer of the plaintiff to the second plea of the defendant and the same being argued by counsel, it is ordered by the Court that said demurrer be and the same is hereby sustained. Defendant in open Court files plea No. 4.

TUESDAY MORNING, JANUARY 5, 1897.

Frank Pierce

vs.

Tennessee Coal, Iron & Railroad Company.

249.

This day comes the parties, plaintiff and defendant, by

their respective attorneys, and to try the issues joined comes a jury of good and lawful men, to-wit, A. H. Irons and eleven others, who being elected, tried and sworn, well and truly to try the issues joined, upon their oaths do say: "We, the jury, find for the plaintiff, and assesss his damage at $5,893.00. A. H. Irons, Foreman. January 5, 1897."

It is therefore considered by the Court that the plaintiff, Frank Pierce, have and recover of the defendant, the Tennessee Coal, Iron & Railroad Company, the sum of five thousand eight hundred and ninety-three ($5,893) dollars, his damages, and the cost of this proceeding, for which let execution issue.

After the jury was empanelled one of the jurors was taken sick, but the attorneys of both the plaintiff and defendant consented in open court that the remaining eleven jurors should hear and decide the cause, and it is so ordered by the Court.

ORDER OF COURT AS TO BILL OF EXCEPTIONS.

Frank H. Pierce

vs.

The Tennessee Coal, Iron & Railroad Company.

249.

Comes the defendant by his attorney, and moves the Court for a new trial, and by consent of attorneys for both sides, it was agreed that the Court should have sixty days to pass upon and decide this motion, and said decision may be made in chambers with same effect if signed in open Court.

By agreement of counsel for both sides in open court, it is ordered that each side may have sixty days from this

date to file bills of exception, and presiding Judge may sign same in chambers with same effect as if signed in open court.

SATURDAY, FEBRUARY 27, 1897.

By direction of the Hon. Aleck Boarman Judge of the District Court of the Western District of Louisiana.

Frank H. Pierce

vs.

Tennessee Coal, Iron & Railroad Co.

249.

This cause having heretofore been submitted upon the motion of the defendant for a new trial, it is now upon due consideration of the Court ordered that the said motion be and the same is hereby denied and overruled.

MOTION FOR NEW TRIAL.

Frank H. Pierce

vs.

Tennessee Coal, Iron & R. R. Co.

Comes defendant in this cause and moves that the verdict of the jury in this cause be set aside and a new trial granted.

1. On the ground that the verdict is contrary to the evidence, and is excessive.

2. On the ground that the Court erred in the law.

WALKER PERCY,
Attorney for Defendant.

[Endorsed.]
Filed in Clerk's Office, January 5th, 1897.
N. W. TRIMBLE, Clerk U. S. Circuit Court.

BILL OF EXCEPTIONS OF DEFENDANT.

In the Circuit Court of the United States for the Southern Division of the Northern District of Alabama.

Frank Pierce

vs.

Tennessee Coal, Iron & Railroad Co.

Be it remembered that on the 5th day of January, 1897, the following proceedings were had in the Circuit Court of the United States in and for the Southern Division of the Northern District of the State of Alabama, before the Hon. Alex Boarman, District Judge, and a jury, viz:

The plaintiff introduced in evidence the contract sued on in this case, the signatures were admitted by counsel for both parties in open Court to be genuine, and which is as follows:

Tennessee Coal, Iron & Railroad Company.—Pratt Mines Division.

G. B. McCormack, Superintendent.

Pratt Mines, Ala., 4th June, 1890.

"Whereas I, F. H. Pierce, while in the employ of the Tennessee Coal, Iron & Railroad Company, Pratt Mines Division, as a machinist was seriously hurt by a trip of

tram cars on the main slope of the mine known as Slope No. 2, and operated by the Tennessee Coal, Iron & Railroad Company, under circumstances which I claim render the said company liable to me for damages, but whereas, they disclaim any liability for said accident or the injuries to me resulting from same, and both parties being desirous of settling and compromising said matter; and, whereas, the said Tennessee Coal, Iron & Railroad Company, did make me a proposition on the —— day of November, 1888, said accident having occurred on the 21st day of May, 1888, that they would furnish me such supplies from the commissary at No. 2 prison, as I might choose to take, pay me regular wages while I was disabled, and give me my coal and wood for fuel at my dwelling and the benefit of the convict garden at No. 2; and, whereas, said proposition was accepted by me and carried out by the said Company; and, whereas in May, 1889, after I had resumed work, a further proposition was made to me to give me work, such as I could do, paying me therefor the wages paid me before said accident, that is $60 a month, and in addition free house rent, or in lieu of house rent a certain amount of supplies from the convict commissary at No. 2 prison, which supplies were to amount to about the sum paid by me for house rent; and, whereas, said agreement has been faithfully kept by both parties; and whereas, on the 4th day of June, 1890, it is mutually agreed between myself and the said company that it will be better to give me the house rent than the supplies of about equal amount from the commissary; now, therefore, it is agreed that in view of the above propositions which have been faithfully carried out that my wages from this date are to be $65 a month, and in addition I am to have free of charge my coal and wood necessary for my household use at my dwelling, and the same benefit from the garden, as is had by others who are allowed the garden privilege, and I on my part agree and bind myself to release the said company from any and all liability for said accident or from the injuries resulting to

me from it or from the effects of it, and agree that this is to be a full and satisfactory settlement of any and all claims which I might have against said company.

(Signed) F. H. PIERCE,
G. B. MCCORMACK.

Witness –
P. J. Rogers,
Erskine Ramsey.

The defendant objected to the introduction of said contract, because it appeared on its face to have been executed not by the defendant, the Tennessee Coal, Iron & Railroad Company, but by G. B. McCormack as an individual; and thereupon this Court overruled the objection, and the defendant excepted.

Frank Pierce, plaintiff, was introduced as a witness, and testified as follows:

I am the plaintiff in this case, and know G. B. McCormack. He was superintendent of defendant on June 4th, 1890, and managed the business of the Pratt Mines Division as business manager. I was discharged by Mr. McCormack. I sent the letter shown in evidence set out in this bill of exceptions, marked Exhibit "A," to G. B. McCormack, and got the letter set out in this bill of exceptions, marked Exhibit "B," from him in reply. Mr. McCormack made the first contract with me. I was injured in May, 1888. Mr. McCormack made the first agreement with me in November, 1888. After I had resumed work, another proposition was made to give me such work as I could do, and pay me sixty-five dollars a month, in addition to other things, by Mr. McCormack. I was discharged on May 4th, and before my discharge I was paid from May, 1888, to April, 1891, as the contract called for; I was paid under contract, and had all the contract calls for until I was discharged. Mr. McCormack was boss in the office at Pratt Mines for the defendant. Colonel Ball, the predecessor of Mr. McCormack, as superintendent, hired me.

Will Rogers, who was an officer of defendant, paid me. I had the use of the garden and other things provided for in the contract.

The plaintiff then offered the contract sued on in evidence.

The defendant objected to the introduction of the contract, because the authority of G. B. McCormack to execute it for defendant was not sufficiently shown, and for the reasons already given as above set out. The Court overruled the objection, and defendant excepted, and thereupon the contract was introduced in evidence.

The plaintiff testified further as follows:

After the receipt of the letter from Mr. McCormack (shown as Exhibit "A" hereto); the defendant never asked me to perform work for them, nor did I ever refuse to perform work for them. I worked for the defendant up to the 4th day of May, and was paid up to the first day of April—they owe me for that month—and have never been called on to do any work for defendant since the discharge, and had no payment from them since then. I worked for them as a machinist, and was injured while in the defendant's employ at Slope No. 2.

The counsel for plaintiff then propounded this question to him— The defendant objected to the question, because the contract on which the suit was brought was one from month to month, and the extent and period of disability was immaterial. The Court overruled the objection, and the defendant excepted. The question was: "State what were the extent of your injuries so received." The witness answered the question as follows: "My left hand was crushed, and the little finger cut off. I can only bend my left hand partially now at the fingers (the witness exhibited his hand. It was a good hand before I was hurt. My leg was broken at the ankle, and a piece of bone 2½ inches long taken out. and that made one leg shorter than

the other, as it is still. My injured leg is 2½ inches shorter than the good one, and pains me now when I stand on it for any length of time down in my ankle. I can only partially bend my foot." (And the plaintiff exhibited his injured hand, showing that he could not more than half close it, and could not grasp anything or freely use the fingers, and that they were weak.)

The plaintiff testified further, as follows:

Mr. McCormack was familiar with the extent of my disability when he made the contract sued on with me. When I made the contract I was not going on crutches. I had got better then. The first time Mr. McCormack saw me after I got hurt was in November, 1888. He then made me a proposition as to what he would do, and gave me fifty dollars, and I went to Nashville and got my leg fixed. Dr. Cunningham, defendant's physician, treated me.

On cross-examination he testified as follows:

I now live at Cowles' Station, and have bought 80 acres of land and am living on it. The only work I have ever done on it, is to put out some fertilizer, and superintend the work on the farm. I ran the compressor at the mines of defendant for over a year after I got well, after I was hurt. I did not take care of the machinery. Another man oiled the engine and I just sat there, and didn't do any work, except to shut the steam off the engine or give her more steam.

I regulated the amount of steam and turned it on and off. Towards the last I oiled the engine. I could do that with one hand. I can't run a stationary engine, because I cannot stay on my feet for any length of time. I couldn't fire the engine, and generally the stationary engineer does that. I couldn't run the engine if somebody fired for me. I couldn't run a locomotive. The way I quit working for the defendant was this: I was working on the day shift and Dunn, a convict, ran the compressor on the night

shift. I went to the warden one Sunday morning and told him I couldn't work with Dunn. Dunn and I had fallen out, and Dunn had been off for two weeks, and I heard on Sunday morning Mr. Rogers was going to put him back. I told Mr. Rogers I couldn't work with him. He said, I don't see why you can't. I said I will work with any body else, but I can't work with Dunn. And the next Monday morning I went to Mr. Rogers and said: "I am ready to go to work any where you put me." He said: "You won't work with Dunn." And I said, "I can't work with Dunn." He went off and made some remark I didn't understand, and then he brought me that discharge and I wouldn't accept it. Dunn came out to the compressor at 4 o'clock every evening and oiled it and took charge of it until morning. He was on night shift and I was on day shift. After he oiled it up at 4 o'clock I would start it up and stay until 5 or 6 in the evening and then go home, and he would stay with it all night until 7 next morning. We didn't work together but on different shifts. After the conversation I had with Mr. Rogers Sunday morning, I went to the compressor and stayed all day with it. After the conversation I had with Rogers Monday morning I went back home and told Mr. Rogers I would be there if he wanted me, and then either in the forenoon or afternoon he gave me my discharge and I gave it back. I don't know who ran the compressor after Monday. I never ran it any more. The first agreement made between Mr. McCormack and myself in November, 1888, was a verbal agreement. The agreement made between me and Mr. McCormack in May, 1889, was also a verbal agreement.

The defendant's counsel then asked plaintiff this question: "State the conversation and agreement made and had between you and Mr. McCormack with reference to what the company would do for you when the first agreement was made in November 1888." The plaintiff objected to the question because this agreement was contained or merged in the original agreement, which was in writing.

The court sustained the objection, and the defendant excepted.

The defendant's counsel also asked the plaintiff this question: "State what the agreement between you and Mr. McCormack was which was made in May, 1889." The plaintiff objected to this question on the same grounds. The Court sustained the objections and defendant excepted.

Counsel for defendant stated that he proposed to show the terms of each agreement, and that no release of plaintiff's cause of action for his injury was exacted from him by the terms of either agreement.

On re-direct examination, counsel for plaintiff asked this question: "Who wrote and prepared the written contract sued on in this case?" The defendant objected to this question because it called for immaterial evidence. The Court overruled the objection and the defendant excepted. The witness answered the question as follows: "Mr. McCormack wrote it himself."

The plaintiff testified further, as follows:

I signed the contract, and Mr. Rogers and Ramsey witnessed it, the day Mr. McCormack wrote it out, but Mr. McCormack did not sign it for some time afterwards; I could not say how long—it might have been a month or two months after. I had the contract in my pocket during this time, which was my copy; Mr. McCormack retained his duplicate. I called Mr. McCormack's attention to the fact that he had not signed the contract, and thereupon he did sign my copy. I did not go back to work until six or eight months after I got hurt. The work I did with the compressor I could do with one hand and sitting down. Dunn was a convict, and got liquor at nights sometimes. He was a tall, stout man.

The counsel for plaintiff then asked plaintiff this question: "What was Dunn's character for peace and quiet?"

The defendant objected to the question, because it called for immaterial evidence; the Court overruled the objection, and defendant excepted. The witness answered the question as follows: "When he was in liquor he was bad, and when he didn't have liquor he was all right."

The counsel for plaintiff then asked plaintiff this question: "Did Dunn make any threats in talking to you." Defendant objected to the question, because it called for immaterial evidence; the Court overruled the objection, and defendant excepted.

The witness answered the question as follows: "He told me to get out once and started toward me. I had picked up a lantern and asked him how it got there, and he said it is none of your damn business; you get out of here and keep out, or I'll kick you out; and he started to me, and I went out, and ain't been back since."

The plaintiff testified further, as follows:

I don't know whether defendant knew whether Dunn was unruly or difficult to get along with or not, or whether he got drunk. He was not frequently drunk.

Plaintiff's counsel then asked plaintiff this question: "Did you refuse to work with him on account of your personal danger?" Defendant objected to the question, for the same reasons above given, and because it was not shown that he communicated such reason to defendant; the the Court overruled the objection, and defendant excepted. The witness answered the question: "Yes, sir."

The witness testified further, as follows:

The mine where I ran the compressor was a convict mine. All the miners were convicts, and some of the foremen were convicts; they were trusties. Dunn was a trusty himself. Another convict worked at the compressor when Dunn was off. I had no objection to the other convict.

On re-cross examination, he testified as follows:

I never told the officers of the defendant anything

about how Dunn had treated me or reported him to any one; I didn't tell Mr. Rogers why I couldn't work with Dunn when he asked me at the time I was discharged. The threats were made two weeks before I quit, but Dunn didn't come out any more before I quit. I worked two weeks after the threats were made. There were men working near the compressor. There were guards close to the compressor at the mouth of the slope. It was necessary to have a man always at the compressor, and that was the duty assigned me to do by Mr. Rogers.

The plaintiff then introduced the following letter above referred to, written by him to said G. B. McCormack— The defendant objected to the introduction of said letter, because it was immaterial and irrelevant and incompetent; the Court overruled the objection and permitted the letter to be read to the jury, and the defendant excepted.

The letter is in words and figures as follows:

EXHIBIT "A."

Birmingham, Ala., May 8, 1891.

G. B. McCormack, Esq., Pratt Mines, Ala:

Dear Sir: On last Monday, the 4th inst., Mr. W. L. Rogers handed me an order on the paymaster of the Tennessee Coal, Iron & Railroad Company for two day's pay and stated in said order that I had voluntarily quit work. The terms of this order show that it is a discharge from the employment of said company, and a violation of the contract existing between said company and myself. I therefore returned the order to Mr. Rogers, and refused to receive it. I have always been and am still ready to comply with my part of the contract, and stand ready to-day or at any time to carry out its provisions. I respectfully address you this communication to inquire whether this order and virtual discharge was delivered to me by your direction, and ask you to reply at your earliest convenience. If

the Tennessee Coal, Iron & Railroad Company have ordered my discharge, it is but just that I should be informed of the fact. Please address me at Birmingham, care of F. S. Ferguson. Very respectfully,

(Signed) F. H. PIERCE.

The plaintiff also introduced in evidence a letter as above referred from G. B. McCormack to plaintiff in reply to the above. The defendant objected to the introduction of said letter because it was immaterial; the Court overruled the objection, and defendant excepted.

The letter is as follows:

EXHIBIT "B."

Pratt Mines, May 12, 1891.

F. H. Pierce, Pratt Mines, Ala.

Dear Sir: Replying to your letter of May 8, 1891, we have to say that since you have seen fit to quit work for the company of your own accord, the company declines to employ you further in its services. Yours truly,

TENNESSEE COAL, IRON & R. R. CO.,
By G. B. MCCORMACK, Ass't G. M.
Care of F. S. FERGUSON, Attorney.

It was admitted that the supplies to be furnished the plaintiff under the contract were worth at least five dollars per month.

The plaintiff here closed his case.

The defendant thereupon introduced the testimony of Dr. R. M. Cunningham, as follows:

I have been practicing medicine for 22 years, and am a graduate of a medical college. I have been convict physician at Pratt Mines for many years. I know the plaintiff, and treated him when he was hurt in 1888. He

had a compound fracture of the right leg. I removed a couple of inches of the main bone that was detached, and dressed it according to the rules of antiseptic surgery, and put it in plaster of paris. His little finger on the left hand was torn off. I also took a fractured bone out of his hand, and dressed the wound in his hand, and reduced a dislocated ankle. The wound in his leg healed but failed to make a bony union. He then went, at my suggestion, to Dr. Briggs at Nashville, who operated on it. After he returned there was a perfect union in the bone. I have examined him recently. One of his legs is now 2 or 2½ inches shorter than the other, and he has a slight stiffness of the ankle, and the to and fro motion of his hand is limited, causing difficulty in flexing his fingers, and his little finger is gone. His power of flexing his fingers is reduced one half. I have observed stationary and locomotive engines being operated almost daily when I am at home, and ride on locomotives frequently at Pratt Mines. I think the plaintiff can run a stationary or locomotive engine in his present condition. I do not think that the plaintiff's leg gives him any pain now, even when he stands on it, but his ankle might hurt him a little. I do not think he could do the best work as a machinist, but there is work that he can do, requiring one hand, in addition to running a stationary or locomotive engine. I think he could do any kind of work that does not require of him to shut his left hand too tightly, and that does not require of him too much walking. When he came back from Nashville his wounds had recovered as much as they have now, with the exception of the hardening of the scars. His general condition was more debilitated, but he soon recovered from that. My recollection is that he came back from Nashville early in 1889.

On cross-examination, he testified as follows:

I am employed by the defendant on a salary, and have been since 1885. I made an examination of the plaintiff

recently at Mr. Tillman's office, where I went to leave my convict bill, and found you and plaintiff there by pure accident. You asked me to make the examination yourself. I told the defendant's attorney that I had made the examination. At the time plaintiff was first hurt I wanted to cut off his leg, and he objected, and I saved it.

The plaintiff's counsel asked the witness this question: "Didn't you tell the plaintiff he would be in hell in ten days if he didn't allow you to cut off his leg?" The defendant objected to the question, because it called for immaterial and hearsay testimony; the Court overruled the objection, and the defendant excepted. The witness answered the question as follows: "I think I told him he would be in hell in 48 hours."

The witness testified further, as follows:

He said he would go with both legs. I never ran an engine. The engineer sits on the seat and handles the lever on the right hand, throws it forward and backwards, holds the throttle, turns the little valve to let the water go in the boiler, sands the track, and so forth. I have seen engineers use both hands to throw the lever, and the plaintiff could use both. He would not have to grasp it with his left hand. The plaintiff has still his muscular force in his arm and forearm, but can't grasp with his left hand. (The witness here examined plaintiff's hand.) I find he can flex his fingers more than I thought he could. His power to flex his fingers is proof positive that his leaders are intact, though not as strong as they were. I can't tell whether he contracted his fingers his best or not The plaintiff was dangerously hurt and dangerously sick after he was hurt for two days. He was feeble in health for eight or ten months after.

W. L. Rogers testified on behalf of the defendant as follows:

I know the plaintiff, and was warden of the prison at

the time he was hurt. They were convicts there, and I had charge of them. I am now defendant's superintendent at Blue Creek. I remember when the plaintiff went to work after he was hurt. When he quit working after he was hurt, he came to me on Sunday morning and asked me if I had put Dunn back at the compressor, and I told him I had; he then said he wouldn't work. I asked him what was the matter with him and Dunn. He said: "Well, if you put him back there I will not work." That is about all he said and about all I said. He didn't say anything about what was the matter, and he turned and walked out in the yard. That conversation took place in the morning in the hall of the prison. It was his time to go to work, and he had on his working clothes. He did not go back to the compressor that day. He said he wouldn't work, and went back home, and I put a man in his place immediately. My recollection is that he was then absent for two or three days, and then he came back Tuesday or Wednesday morning and reported for work. I told him I had put a man in his place, because he had told me Sunday that he had quit and wouldn't work any more, and I had put a man in his place. I also gave him the letter from Mr. Polk, which is hereafter set out in the bill of exceptions as Exhibit "C." The plaintiff ran the compressor every day and Dunn ran it at night, and they didn't come in contact with each other except when they changed shifts. The plaintiff had charge of the compressor. He ran it, greased and looked after it just as any other man would do. Sixty or sixty-five dollars would be a reasonable value for the work he did in running the compressor. He ran it and kept it up for a year or a year and a half just as well as any one else would do. Fifteen or twenty men worked around close to the compressor and right in sight of where plaintiff and Dunn worked. Plaintiff was absent from work from Sunday morning until Tuesday or Wednesday morning with my consent.

On cross-examination, he testified as follows:

I think I put a convict in plaintiff's place, and had a machinist to superintend both shifts. Some of the convicts have a great deal of experience with machinery. Plaintiff did not fire the engine, but oiled it, and put springs and such things as that in it. I saw him frequently at work there after he was hurt. I am familiar with stationary engines, and I think plaintiff could run one all right after he was hurt. He did run it for a year. It requires mechanical skill and experience to grease and attend to an engine.

Dunn was a very good convict; he got a reduction of his term on account of good behavior. He was not a dangerous man, and was above the average—he was a trusty, but there was a guard out there all night.

G. B. McCormack testified for defendant as follows:

I am general manager of defendant, and was its assistant general manager when plaintiff was hurt.

Defendant then asked witness this question: "In November, 1888, when you first agreed to pay plaintiff wages while he was disabled, state whether or not he made any agreement to release his cause of action for injury received against the company?" The plaintiff objected to the question because the contract was embodied in the written contract sued on. The Court sustained the objection and defendant excepted.

Defendant asked the witness this question: "Do you remember plaintiff being paid a lump sum of several hundred dollars before he started to work, after he was hurt. If so state the circumstances as well as you can?" The plaintiff objected to the question because it was immaterial. The Court sustained the objection and defendant excepted.

The witness testified further as follows:

I didn't examine plaintiff to see the extent of his in-

juries at the time the contract sued on was made or before that time. I noticed that his hand was injured, but not in what particular way, I simply knew he was injured in one hand and one leg, but did not know to what extent. I wrote the agreement sued on. The plaintiff told me his understanding of the matter and I wrote it down as he told me.

On cross-examination he testified as follows:

I put the contract in form. He (plaintiff) didn't dictate the last clause; he simply agreed to it. I am still in defendant's service, and have been promoted.

The defendant then introduced in evidence the following letter identified by the witness Rogers, as having been handed plaintiff:

EXHIBIT "C."

Pratt Mines, May 4th, 1891.

Mr. N. N. Polk, Cashier T. C. I. & R. R. Co:

Dear Sir: As Mr. Frank Pierce has discontinued work at Slope No. 2 on his own accord, you will please settle with him for two days in this month and oblige. Yours, etc.,

W. L. ROGERS,
Warden No. 2.

The defendant then rested.

The plaintiff offered the testimony of a witness, who it was admitted was an expert, and had calculated the amount, with interest, of the installments of wages past due on the contract up to the time of the trial, and who stated the objection and exception of defendant on the

ground that it was a matter for the jury, not for the witness, that the amount with interest up to date to the time of the trial according to his calculation, which he believed to be correct, was $5,893.00. The foregoing was all the evidence in the case.

At the conclusion of the evidence the Court stated that it would limit the recovery to the installments of pay due at the commencement of the suit, but after argument said that plaintiff should be entitled to installments due up to the trial, and asked the defendant's attorney if that was his view of the law, viz: That if the plaintiff was otherwise entitled whether he should recover for amounts due to the trial, to which defendant's attorney told the Court that such was the law, and thereupon the Court said it would so rule, and asked plaintiff's attorney to prepare such a charge for the jury, whereupon plaintiff's attorney prepared and handed to the Court this written charge, which the Court thereupon gave to the jury as follows: Under the evidence in this case, I charge you that the plaintiff is entitled to recover in this action, and the measure of his damages is the aggregate amount of all the installments of seventy dollars for each month in default and unpaid, from the time of the commencement of the employment under the contract sued on until the time of the trial, with interest on each installment from the time it fell due up to the time of the trial, which amounts, under the evidence, to the sum of $5,893.00.

The defendant then and there, in the presence of the jury and before the jury retired, duly excepted to the giving of said written charge so requested in writing by the plaintiff, and given by the Court.

The Court gave no other charge to the jury than the written charge above set out, either oral or written.

The defendant requested the Court in writing to give to the jury separately and severally each of the following written charges—

The Court thereupon refused separately and severally to give to the jury any one of the written charges so requested by the defendant, and indorsed his refusal in writing on each charge; and the defendant then and there, in the presence of the jury and before the jury had retired, separately and severally excepted to the refusal of the Court to give each of said written charges so requested by the defendant in writing.

The following are the written charges so requested and refused:

1. If the jury believe the evidence in this case, they must find a verdict for the defendant.

2. If the jury believe the evidence in this case, they must find that plaintiff left defendant's service wrongfully and without legal excuse.

3. If the jury believe from the evidence that the plaintiff left the service of defendant wrongfully or without legal excuse, then the jury must find for the defendant.

4. If the jury believe from the evidence in this case that in May, 1889, when the second agreement between the plaintiff and defendant was made, the plaintiff was not disabled by his injury from performing labor and work, the jury must find for the defendant.

5. If the jury believe from the evidence that the plaintiff was not disabled by reason of his injuries from doing such work as running an engine at and after the time he resumed work for defendant after he received injuries, then the jury must find for the defendant.

6. If the jury believe from the evidence that the plaintiff wrongfully left the service of the defendant, then the jury must find for defendant under its plea of recoupment, and assess such damages as jury may believe from the evidence the defendant may have sustained from the loss of plaintiff's services during the term of the contract.

7. The value of the benefit which the jury may believe from the evidence the defendant would have derived from the continued performance of the work, which plaintiff was required to do by the terms of the contract during the term of the contract, is to be deducted from the amount, the jury may believe from the evidence the plaintiff would have earned under the contract during its term, had it not been terminated, when the jury come to assess the damages.

8. If the jury believe from the evidence in this case that Pierce, at the time he was discharged by defendant, was no longer disabled within the contemplation of the contract sued upon, then the jury must find a verdict for the defendant.

9. The Court charges the jury that under the evidence in this case Pierce gave Rogers no good and sufficient reason for discontinuing work at the compressor at the time he discontinued such work.

10. If the jury believe from the evidence in this case that Pierce capriciously and without good reason refused to continue at the work which he was assigned by the defendant at its compressor, then the Court charges the jury that defendant was guilty of no wrong in discharging plaintiff from his service.

11. The Court charges the jury that under the evidence in this case if they believe that Pierce was unwilling to work on the compressor on alternate shifts with Dunn on account of apprehension of bodily harm from Dunn, that it was his duty to have stated such fact or belief to defendant, its officer or agents.

Defendant tenders this, its bill of exceptions, and prays that the same may be signed, sealed and made part of the record by the presiding judge which is accordingly done

within the time prescribed by a written agreement and an order of Court on this 20th day of February, 1897.

(Signed) ALECK BOARMAN, Judge.

We consent to the above bill of exceptions.

W. A. GUNTER,
and R. C. REDUS,
For Plaintiff.

[Endorsed.]
Filed February 23d, 1897.
N. W. TRIMBLE, Clerk.

PETITION FOR WRIT OF ERROR AND ASSIGNMENT OF ERROR.

In the Circuit Court of the United States for the Southern Division of the Northern District of Alabama.

Tennessee Coal, Iron & Railroad Company, Plaintiff in Error,

vs.

Frank H. Pierce, Defendant in Error.

To the Hon. Don A. Pardee, Judge of the Circuit Court of the United States for the Fifth Circuit:

The petition of the Tennessee Coal, Iron & Railroad Company respectfully shows unto your honor that in the record and proceedings of the Circuit Court of the United States for the Northern District of Alabama, Southern Division, there hath intervened in a certain cause therein pending, wherein your petitioner is defendant, and the said defendant in error is plaintiff, manifest error to its injury, as is particularly shown in the assignment of errors, which is hereto attached as a part of this petition.

And petitioner prays your honor will direct that a writ of error be issued to the said Circuit Court of the United States for the Northern District of Alabama, Southern Division, that the record and proceedings in said cause may be returned into the United States Circuit Court of Appeals for the Fifth Circuit, and that the rulings and judgment of said Circuit Court may be held to be error, and the said judgment be reversed, and said cause remanded to said Circuit Court for further proceedings.

And your petitioner will ever pray, etc.

WALKER PERCY,
and W. I. GRUBB,
Attorneys for Plaintiff in Error.

ASSIGNMENTS OF ERROR OF DEFENDANT.

Tennessee Coal, Iron & Railroad Co., Plaintiff in Error,

vs.

Frank H. Pierce, Defendant in Error.

In the Circuit Court of the United States for the Southern Division of the Northern District of Alabama.

Now comes the plaintiff in error by its attorneys and says and alleges that in the record and proceedings of the Circuit Court of the United States for the Southern Division of the Northern District of Alabama, in a certain cause between the defendant in error, Frank H. Pierce, and the plaintiff in error, said Tennessee Coal, Iron & Railroad Company, there has intervened to its prejudice manifest error; and it assigns error as follows, to-wit:

1. The said Court erred in sustaining plaintiff's demurrer to the second plea of defendant.

1½. The Court erred in overruling the defendant's demurrer to plaintiff's complaint as amended.

2. The said Court erred in overruling the defendant's objection to the introduction of the written contract sued on in this case in evidence.

3. The Court erred in overruling the objection of defendant to the following question: "State what were the extent of your injuries so received," propounded by plaintiff's counsel to the plaintiff himself. The answer to the question was: "My left hand was crushed, and the little finger cut off. I can only bend my left hand now partially at the fingers. It was a good hand before I was hurt. My leg was broken at the ankle, and a piece of bone two and one-half inches long taken out, and that made one leg shorter than the other, as it still is. My injured leg pains me now when I stand on it any length of time down in the ankle. I can only partially bend my foot."

4. The Court erred in sustaining plaintiff's objection to the following question propounded to plaintiff by defendant's counsel, viz: "State the conversation and agreement made and had between you and Mr. McCormack with reference to what the company would do for you when the first agreement was made in November, 1888."

5. The Court erred in sustaining plaintiff's objection to the following question propounded to plaintiff by defendant's counsel, viz: "State what the agreement between you and Mr. McCormack was which was made in May, 1889."

6. The Court erred in overruling defendant's objection to the following question propounded by counsel for plaintiff to plaintiff himself, viz: "Who wrote and prepared the written contract sued on in this case?" The answer to the question was: "Mr. McCormack wrote it himself."

7. The Court erred in overruling defendant's objec-

tion to the following question, propounded by plaintiff's counsel to plaintiff himself, viz: "What was Dunn's character for peace and quiet?" The answer to the question was: "When he was in liquor he was bad, and when he didn't have liquor he was all right."

8. The Court erred in overruling defendant's objection to the following question propounded to the plaintiff by his counsel, viz: "Did Dunn make any threats in talking to you?" The answer was: "He told me to get out at once and started towards me. I had picked up a lantern and asked him how it had got there, and he said: "It is none of your damn business; you get out of here and keep out, or I'll kick you out," and he started toward me, and I went out and ain't been back since."

9. The Court erred in overruling the defendant's objection to the following question propounded to plaintiff by his counsel, viz: "Did you refuse to work with him on account of your personal danger." The answer was: "I did."

10. The Court erred in overruling defendant's objection to the introduction of the letter from plaintiff to the witness, G. B. McCormack, dated May 8, 1891.

11. The Court erred in overruling defendant's objection to the introduction of the letter from the defendant to the plaintiff, dated May 12, 1891.

12. The Court erred in overruling defendant's objection to the following question asked by plaintiff's counsel of witness Cunningham, viz: "Didn't you tell plaintiff he would be in hell in ten days if he didn't allow you to cut off his leg?" The answer was: "I think I told him he would be in hell in forty-eight hours."

13. The Court erred in sustaining plaintiff's objection to the following question asked by defendant's counsel of witness McCormack, viz: "In November, 1888, when you

first agreed to pay plaintiff wages while he was disabled, state whether or not he made any agreement to release his cause of action for injury received against the company."

14. The Court erred in sustaining plaintiff's objection to the following question asked by defendant's counsel of witness McCormack, viz: "Do you remember plaintiff being paid a lump sum of several hundred dollars before he started to work, after he was hurt; if so, state the circumstances as well as you can?"

15. The Court erred in overruling defendant's objection to the testimony of the expert witness to the effect that the amount due under the contract sued on with interest to the time of the trial was $5,893.00.

16. The Court erred in giving to the jury at plaintiff's request the following written charge: "Under the evidence in this case, I charge you that the plaintiff is entitled to recover in this action, and the measure of his damages is the aggregate amount of all the installments of seventy dollars for each month in default and unpaid from the time of the commencement of the employment under the contract sued on until the time of the trial, with interest on each installment from the time it fell due up to the time of the trial, which amounts under the evidence to the sum of $5,893.00.

17. The Court erred in refusing to give to the jury at the request of the defendant the following written charge, No. 1: "If the jury believe the evidence in this case, they must find a verdict for the defendant.

18. The Court erred in refusing to give to the jury at defendant's request the second written charge, viz: "If the jury believe the evidence in this case, they must find that the plaintiff left defendant's service wrongfully and without legal excuse."

19. The Court erred in refusing to give to the jury at defendant's request the third charge in writing, viz: "If

the jury believe from the evidence that the plaintiff left the service of the defendant wrongfully or without legal excuse, then the jury must find for the defendant."

20. The Court erred in refusing to give to the jury at defendant's request the fourth written charge, viz: "If the jury believe from the evidence in this case that in May, 1889, when the second agreement between the plaintiff and defendant was made, the plaintiff was not disabled by his injury from performing work and labor, the jury must find for the defendant.

21. The Court erred in refusing to give to the jury the fifth written charge requested by defendant, as follows: "If the jury believe from the evidence that the plaintiff was not disabled by reason of his injuries from doing such work as running an engine at and after the time he resumed work for defendant after he received his injuries, then the jury must find for the defendant.

22. The Court erred in refusing to give to the jury at defendant's request the sixth written charge, viz: "If the jury believe from the evidence that the plaintiff wrongfully left the service of the defendant, then the jury must find for the defendant under its plea of recoupment and assess such damages as the jury may believe from the evidence the defendant may have sustained from the loss of plaintiff's services during the term of the contract."

23. The Court erred in refusing to give at defendant's request, the seventh written charge, viz: "The value of the benefit which the jury may believe from the evidence, the defendant would have derived from the continued performance of the work, which plaintiff was required to do by the terms of the contract, during the term of the contract, is to be deducted from the amount, the jury may believe from the evidence the plaintiff would have earned under the contract during its term, had it not been terminated, when the jury come to assess the damages.

24. The Court erred in refusing to give to the jury at defendant's request, the eighth written charge, viz: "If the jury believe from the evidence in this case that Pierce, at the time he was discharged by defendant, was no longer disabled within the contemplation of the contract sued upon, then the jury must find a verdict for the defendant."

25. The Court erred in refusing to give the jury, at defendant's request the ninth written charge, viz: "The Court charges the jury that under the evidence in this case Pierce gave Rogers no good and sufficient reason for discontinuing work at the compressor at the time he discontinued such work."

26. The Court erred in refusing to give to the jury, at defendant's request, the tenth written charge, viz: "If the jury believe from the evidence in this case that Pierce capriciously and without good reason refused to continue at the work he was assigned by defendant at its compressor, then the Court charges the jury that defendant was guilty of no wrong in discharging the plaintiff from its service.

27. The Court erred in refusing to give to the jury at defendant's request the eleventh written charge, viz: "The Court charges the jury that under the evidence in this case, if they believe that Pierce was unwilling to work on the compressor on alternate shifts with Dunn on account of apprehension of bodily harm from Dunn, that it was his duty to have stated such fact or belief to defendant, its officer or agents.

WALKER PERCY,
Attorney for Plaintiff in Error.

[Endorsed.]
Filed in Clerk's Office this March 9, 1897.
N. W. TRIMBLE, Clerk.

MARCH TERM, 1897.

TUESDAY MORNING, MARCH 9, 1897.

Court met pursuant to adjournment. Present and presiding the Hon. John Bruce, Judge of the District Court of the United States for the Middle and Northern District of Alabama, Emmet O'Neal, United States Attorney, Clerk and Marshal.

Tennessee Coal, Iron & Railroad Co., Plaintiff in Error,

vs.

Frank H. Pierce, Defendant in Error.

Upon reading the petition of the Tennessee Coal, Iron & Railroad Company, plaintiff in error, it is ordered that the writ of error, returnable into the United States Circuit Court of Appeals for the Fifth Circuit, be allowed as prayed for, the same to be returnable in the said Court within thirty days from this date, on the plaintiff giving bond in the sum of twelve thousand dollars, conditioned and payable according to law, to be approved by the Clerk of the Circuit Court at Birmingham, let supersedeas issue.

This 9th day of March, 1897.

(Signed) ALEX BOARMAN,
Judge.

WRIT OF ERROR.

UNITED STATES OF AMERICA, ss.

The President of the United States—

To the Honorable the Judge of the Circuit Court of the

United States for the Southern Division of the Northern District of Alabama—Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between the said Frank H. Pierce, as plaintiff, and the said Tennessee Coal and Iron and Railroad Company, as defendant, a manifest error hath happened, to the great damage of the said Tennessee Coal, Iron and Railroad Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Fifth Judicial Circuit, together with this writ, so that you have the same at New Orleans, La., within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the [SEAL] United States, the ninth day of March, in the year of our Lord one thousand eight hundred and ninety-seven.

N. W. TRIMBLE,

Clerk of the Circuit Court of the United States Southern Division of the Northern District of Alabama.

Allowed by—

ALECK BOARMAN,

Judge.

CITATION.

UNITED STATES OF AMERICA, ss:

The President of the United States:

To Frank H. Pierce—

Greeting: You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Fifth Judicial Circuit, to be holden at New Orleans, La., within thirty days from the date hereof pursuant to a writ of error, filed in Clerk's Office at the Circuit Court of the United States for the Southern Division of the Northern District of Alabama, wherein the Tennessee Coal, Iron & Railroad Company, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United [SEAL.] States, this 9th day of March, in the year of our Lord, one thousand eight hundred and ninety seven.

ALECK BOARMAN, Judge.

On this 9th day of March in the year of our Lord, one thousand eight hundred and ninety-seven, personally appeared William I. Grubb before me, the subscriber, N. W. Trimble, Clerk of the Circuit Court of the United States for the Southern Division of the Northern District of the State of Alabama, and makes oath that he delivered a true copy of the within citation to Robert C. Redus, one of the attorneys for the defendant in error.

Sworn to and subscribed the 9th day of March A. D., 1897.

WM. I. GRUBB.
N. W. TRIMBLE, Clerk.

[Endorsed.]
Filed in Clerk's Office this 9th March, 1897.
N. W. TRIMBLE, Clerk.

ORDER ALLOWING WRIT OF ERROR.

In the Circuit Court of the United States for the Southern Division of the Northern District of Alabama.

Tennessee Coal, Iron & Railroad Co., Plaintiff in Frror.

vs.

Frank H. Pierce, Defendant in Error.

Upon reading the petition of the Tennessee Coal, Iron & Railroad Company, plaintiff in error, it is ordered that the writ of error, returnable into the United States Circuit Court of Appeals for the Fifth Circuit, be allowed as prayed for; the same is to be returnable in the said Court within thirty days from this date on the plaintiff giving bond in the sum of twelve thousand dollars, conditioned and payable according to law, to be approved by the Clerk of the Circuit Court at Birmingham; let supersedeas issue.

This the 9th day of March, 1897.

ALECK BOARMAN, Judge.

[Endorsed.]
Filed in Clerk's office this 9th March, 1897.
N. W. TRIMBLE, Clerk.

APPEAL AND SUPERSEDEAS BOND.

Know All Men by these Presents, That we, the Tennessee Coal, Iron & Railroad Company, a corporation, as principal, and the American Surety Company, of New York, a body corporate under the laws of the State of New York, as sureties, are held and firmly bound unto Frank H. Pierce in the full and just sum of twelve thousand ($12,000.00) dollars, to be paid to the said Frank H. Pierce, his certain attorney, executors, administrators or assigns: to which payment well and truly to be made, we bind ourselves, our successors, [illegible]tly and severally, by these presents. Sealed with our seals, and dated this 26th day of February, in the year of our Lord one thousand eight hundred and ninety-seven.

Whereas, lately at a regular term of the Circuit Court of the United States, for the Southern Division of the Northern District of Alabama, in a suit pending in said Court between Frank H. Pierce, as plaintiff, and the Tennessee Coal, Iron & Railroad Company, as defendant, a judgment was rendered against the said Tennessee Coal, Iron & Railway Company, and the said Tennessee Coal, Iron & Railroad Company having obtained a writ of error, and filed a copy thereof in the Clerk's office of the said Court to reverse the said judgment in the aforesaid suit, and a citation directed to the said Frank H. Pierce, citing and admonishing him to be and appear at the United States Circuit Court of Appeals for the Fifth Circuit, to be holden at New Orleans, La., within thirty days from the date thereof.

Now, the condition of the above obligation is such, that if the said Tennessee Coal, Iron & Railroad Company shall prosecute said writ of error to effect, and answer all damages and costs if it fail to make said plea good, then the above obligatio to be void; else to remain in full force and virtue.

TENNESSEE COAL, IRON & RAILROAD CO., [Seal]
By WALKER PERCY, Attorney. [Seal]
AMERICAN SURETY CO., of New York, [Seal]
By DAVID A. REAPERS, 2d Vice-Pres, Atty. [Seal]
Sealed and delivered in presence of ———.
[SEAL.]

Approved by—
ALECK BOARMAN,
Judge.

PLAINTIFF'S BILL OF EXCEPTIONS.

F. H. Pierce, Plaintiff,

vs.

Tennessee Coal, Iron & Railroad Co., Defendants.

Circuit Court of the United States at Huntsville, Ala.

Be it remembered at the trial of the above cause the following proceedings were had:

The plaintiff introduced and read in evidence the contract sued on and introduced evidence tending to prove the allegations of the complaint. The plaintiff also introduced evidence showing that the plaintiff at the time of his discharge by defendant from its employment in May, 1891, was 55 years of age; that he was then and has been since in good health, and that he was addicted to no habits of drinking or otherwise affecting his health and expectancy of life, and introduced the American Tables of Mortality used by insurance companies, showing the expectancy of life of plaintiff at the time of his discharge from defendant's employment, and at the time of the trial. But the Court announced that it would allow no recovery on the contract beyond the installments of wages due and in de-

fault up to the date of the trial, and that it would entertain a motion from the defendant to exclude all evidence as to the age, health and expectancy of life of the plaintiff on the ground that it was immaterial and irrelevant, and because damages for the expectancy of life was a matter too vague and uncertain to be allowed, and thereupon the defendant moved the Court to rule out and exclude all evidence relating to the health and habits and expectancy of life of the plaintiff on the ground that damages could not be allowed beyond the day of trial, which motion being heard by the Court was granted and all such evidence was excluded, and to this action of the Court the plaintiff then and there, and at the time of the ruling, duly excepted. To raise the same point plaintiff asked the Court to give the following instructions to the jury which were in writing and were asked separately and severally, and which the Court severally and separately refused, and to which several refusals the plaintiff separately and severally and duly excepted, while the jury were at the bar, and before retiring to consider their verdict.

1. If the defendant, after making the contract in evidence, and before the bringing of this suit, refused to make the monthly payments therein stipulated to be made, and to furnish the articles therein agreed to be furnished, and refused to further employ the plaintiff, it thereby committed a breach of the contract entitling the plaintiff to bring an action, and to recover therein all damages to date of such action and the trial thereof, and what will probably and reasonably be sustained by him thereafter during the period of his life if his disability is permanent. And in this connection the jury may consider the plaintiff's age and physical condition at the time of his discharge, and how far he will likely fall short of being able to earn the wages he was to get under the contract, and he would be entitled to recover the present value of the wages stipulated to be paid and articles to be furnished under the con-

tract, less such sum as the jury may, under the evidence and having regard to plaintiff's condition, find he can earn in the future.

2. If the defendant after making the contract sued on and before the suit refused further to pay the plaintiff and to furnish the articles stipulated to be furnished, and refused to employ the plaintiff and discharge him, the plaintiff is entitled to full benefit of his contract, which is the present value of the money agreed to be paid, and the articles to be furnished under the contract for the period of his life if his disability is permanent, less such sum as the jury may find the plaintiff may be able to earn in the future, and may have been able heretofore to earn, and less such loss as defendant may have sustained from the loss of plaintiff's service without defendant's fault.

And this is signed as plaintiff's bill of exceptions, in pursuance of the order of the Court and written consent of counsel.

(Signed) ALECK BOARMAN,
Judge.

We consent to the above bill of exceptions
WALKER PERCY,
Attorney for Defendant.

[Endorsed.]
Filed February 23, 1897.
N. W. TRIMBLE, Clerk.

PETITION FOR WRIT OF ERROR AND ASSIGNMENTS OF ERROR BY FRANK H. PIERCE.

In the Circuit Court of the United States for Southern Division of the Northern District of Alabama.

Frank H. Pierce, Plaintiff in Error,

vs.

Tennessee Coal, Iron and Railroad Co., Defendant in Error.

To the Honorable Judges of the United States Circuit Court:

The petition of Frank H. Pierce respectfully shows unto your honor that in the record and proceedings of the Circuit Court of the United States for the Northern District of Alabama, Southern Division, there hath intervened in a certain cause therein pending, wherein your petitioner is plaintiff and the said defendant in error is defendant, manifest error to his injury, as is particularly and specially shown in the assignments of error, which is hereto attached as part of this petition.

And petitioner prays that your honor will direct that a writ of error be issued to the said Circuit Court of the United States for the Northern District of Alabama, Southern Division, that the record and proceedings in said cause may be returned into the United States Circuit Court of Appeals for the Fifth Circuit, and that the rulings and judgment of said Circuit Court may be held to be error, and the said judgment be reversed, and said cause remanded to said Circuit Court for further proceedings; and you petitioner will ever pray.

GUNTER & GUNTER,
and ROBERT C. REDUS,
Attorneys for Plaintiff in Error.

We hereby waive issuance and service of citation.

WALKER PERCY,
Attorney for Defendant.

ASSIGNMENTS OF ERROR BY PLAINTIFF.

In the Circuit Court of the United States for the Southern

Division of the Northern District of Alabama.

Frank H. Pierce, Plaintiff in Error,

vs.

Tennessee Coal, Iron & Railroad Co., Defendant in Error.

Now comes the plaintiff in error by his attorneys, and says and alleges that in the record and proceedings of the Circuit Court of the United States for the Southern Division of the Northern District of Alabama, in a certain cause between the defendant in error, the Tennessee Coal, Iron & Railroad Company, and the plaintiff in error, said Frank H. Pierce, there has intervened to his prejudice manifest error, and he assigns error as follows, to-wit:

1. That the Court erred in excluding from the jury, upon motion of defendant, competent evidence introduced by plaintiff, viz:

"That plaintiff was 55 years of age at the time of his discharge by defendant in May, 1891; that plaintiff was then and has been in good health since; that he was addicted to no bad habits of drinking or otherwise effecting his health and expectancy of life, the American tables of mortality used by insurance companies showing the expectancy of life of plaintiff at the time of the discharge from defendant's employment and at the time of the trial.',

2. The Court erred in giving to the jury the following charge, viz:

"No recovery on the contract beyond the installments of wages due and in default up to the date of the trial, can be allowed by the jury in estimating the amount of plaintiff's damages."

3. The Court erred in refusing to give to the jury at the request of plaintiff the following written charge, No. 1, viz:

"If the defendant after making the contract in evidence and before the bringing of this suit, refused to make

the monthly payments therein stipulated to be made and to furnish the articles therein agreed to be furnished, and refused to further employ the plaintiff, it thereby committed a breach of the contract entitling the plaintiff to bring an action, and to recover therein all damages to date of such action and the trial thereof, and what will probably and reasonably be sustained by him thereafter during the period of his life if his disability is permanent. And in this connection the jury may consider the plaintiff's age and physical condition at the time of his discharge and how far he will likely fall short of being able to earn the wages he was to get under the contract, and he would be entitled to recover the present value of the wages stipulated to be paid and articles to be furnished under the contract, less such sum as the jury may, under the evidence, and having regard to plaintiff's condition find he can earn in the future."

4. The Court erred in refusing to give to the jury at the request of plaintiff the following written charge No. 2, viz:

"If the defendant after making the contract sued on, and before this suit refused further to pay the plaintiff and to furnish the articles stipulated to be furnished, and refused to employ the plaintiff and discharged him, the plaintiff is entitled to full benefit of his contract which is the present value of the money agreed to be paid and the articles to be furnished under the contract for the period of his life if his disability is permanent, less such sum as the jury may find the plaintiff may be able to earn in the future and may have been able to heretofore earn, and less such loss as defendant may have sustained from the loss of plaintiff's services without defendant's fault."

GUNTER & GUNTER,
and ROBERT C. REDUS,
Attorneys for Plaintiff in Error.

[Endorsed.]

Filed in Clerk's office this 15th day of March, A. D., 1897.

N. W. TRIMBLE, Clerk.

MARCH TERM.

MONDAY MORNING, MARCH 15, 1897.

Court met pursuant to adjournment, present and presiding, the Hon. John Bruce, Judge of the District Court of the United States for the Middle and Northern District of Alabama; Emmet O'Neal, United States Attorney; Clerk and Marshal.

Frank H. Pierce, Plaintiff in Error,

vs.

Tennessee Coal, Iron & Railroad Co., Defendant in Error.

Upon reading the petition of Frank H. Pierce, plaintiff in error, it is ordered that the writ of error returnable into the United States Circuit Court of Appeals for the Fifth Circuit be allowed as prayed for, the same to be returnable in said Court within thirty days from this date.

This 15th day of March, 1897.

(Signed) JOHN BRUCE,
Judge.

[Endorsed.]
Filed March 15, 1897.
N. W. TRIMBLE, Clerk.

WRIT OF ERROR.

UNITED STATES OF AMERICA, ss.

The President of the United States;

To the Honorable the Judge of the Circuit Court of the United States for the Southern Division Northern District of Alabama; Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between the Tennessee Coal, Iron & Railroad Company, defendant in error, and Frank H. Pierce, plaintiff in error, a manifest error hath happened, to the great damage of the said Frank H. Pierce as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Fifth Judicial Circuit, together with this writ, so that you have the same at New Orleans, La., within 30 days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the [SEAL] United States, the 15th day of March, in the year of our Lord one thousand eight hundred and ninety-seven.

(Signed) N. W. TRIMBLE,

Clerk of the Circuit Court of the United States, Southern

Division of the Northern District of Alabama.
Allowed by
(Signed) JOHN BRUCE, Judge.

[Endorsed.]
Filed March 15, 1897.
N. W. TRIMBLE, Clerk.

AGREEMENT OF COUNSEL.

In the Circuit Court of the United States for the Southern Division of the Northern District of Alabama.

Frank H. Pierce

vs.

The Tennessee Coal, Iron & Railroad Company.

We hereby agree to have only one record for use in the United States Circuit Court of Appeals in this cause on writs of error, sued out by both parties in this cause. The plaintiff, Frank H. Pierce, also agrees to pay for the printing and preparation of one-half of the complaint and all of the costs of printing his bill of exceptions, his writ of error and assignment of errors, and the Tennessee Coal, Iron & Railroad Company agrees to pay for the balance.

March 15, 1897.

GUNTER & GUNTER,
and ROBERT C. REDUS,
Attorneys for Plaintiff.
WALKER PERCY,
Attorney for Defendant.

[Endorsed.]
Filed in Clerk's Office this 15th March, 1897.
N. W. TRIMBLE, Clerk.

CLERK'S CERTIFICATE.

I, N. W. Trimble, Clerk of the Circuit Court of the United States for the Northern District of Alabama, hereby certify that the foregoing pages, numbered from 1 to 70, inclusive, contain a true and correct transcript of the proceedings and record in a certain cause lately pending and determined in said Circuit Court, wherein Frank H. Pierce was plaintiff and the Tennessee Coal, Iron & Railroad Company, a body corporate, was defendant, as the same now appears of record and on file in my office.

In testimony whereof, I hereunto subscribe my name and cause the seal of said Circuit Court to be affixed, this 26th day of March, A. D. 1897.

[SEAL.]

N. W. TRIMBLE,

Clerk U. S. Cir. Court Nor. Dist. Ala.

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT.

NOVEMBER TERM, 1896. May 24, 1897.

(Extract from Minutes).

Tennessee Coal, Iron & Railroad Company
vs.
Frank H. Pierce.
} No. 590.

This cause was regularly called this day and was argued by Mr. W. A. Gunter for Frank H. Pierce, and the further hearing postponed until tomorrow.

NOVEMBER TERM, 1896. May, 1897.

(Extract from Minutes).

Tennessee Coal, Iron & Railroad Company
vs.
Frank H. Pierce.
} No. 590.

This cause came on again to be heard and was submitted to the court after further argument by Mr. W. A. Gunter for Frank H. Pierce, and by Mr. W. I. Grubb for the Tennessee, Coal, Iron & Railroad Company.

NOVEMBER TERM, 1896. June 11, 1897.

(Extract from Minutes).

Tennessee Coal, Iron & Railroad Company
vs.
Frank H. Pierce.
} No. 590.

This cause came to be heard on the transcript of the record from the Circuit Court of the United States for

the Northern District of Alabama, and was argued by counsel.

On Consideration Whereof. It is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause, be, and the same is hereby reversed and this cause remanded to said Circuit Court for further proceedings in accordance with the views expressed in the opinion of this court rendered in this cause.

It is further adjudged that the defendant in error, Frank H. Pierce, be condemned to pay the costs of this court for which execution may issue out of said Circuit Court. Opinion:

McCormick, Circuit Judge.

Frank H. Pierce, the defendant in error, brought his action in the State Court of Alabama against the Tennessee, Coal, Iron & Railroad Company, plaintiff in error, on January 22, 1892. His declaration filed on the same day is as follows:

"The plaintiff claims of the defendant, a body corporate, incorporated under the laws of the State of Tennessee, and resident and doing business in said State of Alabama, county of Jefferson, the sum of fifty thousand dollars, as damages for the breach of a certain contract in writing entered into between the plaintiff and the defendant by its agent, in substantially the words and figures following, to-wit:

"4th of June, 1890. Whereas, I, F. H. Pierce, while in the employ of the Tennessee, Coal, Iron & Railway Company, Pratt Mines Division, as a machinist was seriously hurt by a trip of tram cars on the main slope of the mine known as Slope No. 2, and operated by the Tennessee Coal, Iron & Railroad Company, under circumstances which I claim render the said company lia-

ble to me for damages, but, whereas, they disclaim any liability for said accident or injuries to me resulting from same, and both parties being desirous of settling and compromising said matter; and, whereas, the said Tennessee Coal, Iron & Railroad Company did make me a proposition on the —— day of November, 1888, said accident having occurred on the 21st day of May, 1888, that they would furnish me such supplies from the commissary at No. 2 prison as I might choose to take; pay me regular wages while I was disabled, and give me my coal and wood for fuel at my dwelling, and the benefit of the convict garden at No. 2; and, whereas, said proposition was accepted by me and carried out by the said company; and, whereas, in May, 1889, after I had resumed work, a further proposition was made to give me work, such as I could do, paying me therefor the wages paid me before said accident, that is, $60 a month, and, in addition, free house rent; and, whereas, said agreement has been faithfully kept by both parties; and, whereas, on the 4th day of June, 1890, it is mutually agreed between myself and the said company that it will be better to give me the house rent than the supplies of about equal amount from the commissary. Now, therefore, it is agreed that, in view of the above propoiitions which have been faithfully carried out, that my wages from this date are to be $65 per month, and, in addition, I am to have, free of charge, my coal and wood necessary for my household use at my dwelling, and the same benefit from the garden as is had by others who are allowed the garden privilege, and I, on my part, agree and bind myself to release the said company from any and all liability for said accident, or from injuries resulting to me from it, or the effects of it, and agree that this is to be a full and satisfactory settlement of any and all claims which I might have against said company.'

And plaintiff avers that, in and by said agreement, the said defendant, for the consideration therein mentioned, became liable to pay to the plaintiff monthly during his life the wages stipulated therein, to be paid to him monthly, to-wit: the sum of sixty-five dollars, and to furnish him at his dwelling, free of charge, the coal and wood necessary for his household use, and to allow him the same benefit from the garden of the said defendant as is had by others who are allowed the garden privilege; and plaintiff avers that others then had, and since have had, the free use of the garden of said defendant for vegetables for domestic use, and that this privilege is worth the sum of five dollars per month; and plaintiff avers that he has at all times been ready and willing, and offered to do for said defendant such work given to him to do as he was able to do, and that he had labored at the same for such reasonable time as he was able to work and bound to work under said contract.

And plaintiff avers that by the injuries received by him from said accident mentioned in said contract, he was permanently disabled in the use of his legs and hands, and that he was so otherwise injured thereby that his strength and health is such that he is incapacitated to reasonably do more work for the said defendant than he has done and offered to do since the said contract was entered into. And that he has at all times since the said contract was entered into, fully carried out and performed the stipulations on his part to be done and performed. But the plaintiff avers that the said defendant has, without any reasonable ground for so doing, abandoned said contract and refused to carry the same out, claiming that there is no obligation upon it to pay plaintiff the wages therein stipulated to be paid longer than it suits its pleasure to do so, and, accordingly, said defendant has wholly neglected and re-

fused to be governed by the terms of said contract, and has failed and refused to pay plaintiff the sum of sixty-five dollars for six months last past, before the commencement of this suit, and has failed and refused to furnish the defendant at his dwelling the coal and wood necessary for his household use for the same period, and plaintiff avers that the value of the coal and wood necessary for his household use is worth the sum of five dollars per month, and that said defendant has wholly and purposely disregarded and refused to abide by the obligations of said contract, for the said period of six months last past, before the commencement of this suit, and has wholly and entirely abandoned said contract, and discharged the plaintiff from its service.

Wherefore, the said defendant became liable to pay to the plaintiff his reasonable damages, which plaintiff avers was and is the sum of fifty thousand dollars for its breach and abandonment of the stipulations of the said contract above set out; and being so liable, and in consideration thereof, the said defendant promised to plaintiff on, to-wit: the first day of February, 1891, to pay plaintiff the sum of fifty thousand dollars, but though often requested so to do, has hitherto neglected and refused, and still neglects and refuses to pay the same, to the damage of the plaintiff fifty thousand dollars, for which he sues."

On January 29, 1894, the plaintiff in error, defendant in the State Court, was allowed to withdraw its plea and file demurrers to the complaint. The demurrer was sustained by the court, and the plaintiff declining to amend, the court rendered judgment in favor of the defendant.

From this judgment of the State Circuit Court the plaintiff in that action appealed to the Supreme Court of the State of Alabama. The record before us does not show any further action in the State Court. It does

show that upon application of plaintiff in error presented March 23, 1896, to the Circuit Court of the United States, that court granted an order for the removal of the cause from the State Court to the Circuit Court. It appears that the defendant demurred to plaintiff's complaint in the Circuit Court, and that the demurrer was overruled January 4, 1897. On the same day, the defendant filed the following pleas:

"1. The defendant, for answer to the complaint, says that it denies each and every allegation therein contained.

2. The defendant for further answer to the complaint, says that the plaintiff, under and by the terms of the contract set out in the complaint, contracted to perform for the defendant during the term thereof, such service as he was able to perform, in consideration for the promises made by defendant therein, and the defendant avers that the plaintiff thereafter became able to perform services for the defendant, and did in fact perform such service for some time thereafter; and that while engaged in the performance of such service, the plaintiff voluntarily, and without excuse therefor, refused to further perform such service as he was able to perform, and was in fact performing for the defendant, as required by said contract, and the defendant thereupon discharged the plaintiff from its service; and the defendant avers that the plaintiff failed to comply with the conditions imposed upon him by said contract.

3. The defendant for further answer to the complaint, says that the contract upon which this action is founded is not executed by it or any one authorized by it to bind it in the premises, and defendant makes oath that this plea is true."

Plaintiff joined issue on the first and third pleas, and demurred to the second plea, on the ground that said plea does not go to the whole consideration of the contract and is no answer to the entire action. Plaintiff's demurrers to the second plea were sustained. On the trial there was a substantial conflict in the testimony admitted, but there was credible positive testimony tending to establish the defendant's second plea. The plaintiff testified on his own behalf, and being cross-examined by the defendant's counsel, was asked to state the conversation and agreement made and had between him and Mr. McCormack with reference to what the company would do for him when the first agreement was made, in November, 1888. To this question plaintiff, by counsel, objected, on the ground that this agreement was contained or merged in the original agreement, which was in writing. The court sustained the objection and the defendant excepted. The defendant's counsel also asked plaintiff to state what the agreement between him and Mr. McCormack was which was made in May, 1889. The plaintiff by counsel, made the same objection to this question, which was sustained by the court, and the defendant excepted.

The court gave to the jury the following written instruction, and no other, either oral or written:

"Under the evidence in this case, I charge you that the plaintiff is entitled to recover in this action, and the measure of his damages is, the aggregate amount of all the installments of seventy dollars for each month in default and unpaid, from the time of the commencement of the employment under the contract sued on until the time of the trial, with interest on each installment from the time it fell due up to the time of the trial, which amounts, under the evidence, to the sum of $5,893.00."

In obedience to this instruction, the jury returned a verdict in favor of the plaintiff for $5,893.00, on which judgment was duly rendered, and the defendant sued out this writ of error.

We cannot affirm this judgment, and we find it very difficult to discuss the propositions which the case presents, because they appear to us to be anomalous. On no view of the pleadings and proof which we can take was the trial court justified in directing a verdict in this case. The charge given to the jury plainly withdraws the case from their consideration, and their action, as far as they acted, was purely clerical.

After hearing the above oral arguments submitted by counsel for the respective parties and carefully considering the elaborate briefs filed by each, and thoroughly examining the record, we remain at a loss to know exactly what view of the case induced the action of the Circuit Court. As has been already said, the record in this case does not bring up before us any judgment of the State Court, except the action of that court sustaining the demurrer to the plaintiff's declaration and dismissing the plaintiff's cause of action. We infer from the case remaining in the State Court and being removed to the Circuit Court, that the action of the State Circuit Court was reversed by the Supreme Court. Both counsel have referred to an opinion of the Supreme Court of Alabama reversing that judgment and constructing the contract declared on in this case. There are suggestions in the brief in reference to the suppression of a part of the opinion, and some action, not very intelligible, on an application for rehearing. The only thing that does satisfactorily appear is that the Supreme Court of Alabama decided that the demurrer to plaintiff's action was improperly dismissed, and that the judgment of the State Circuit Court was reversed and the cause remanded, but the action thereon is not pre-

sented in a way to enlighten or embarrass us in the consideration of the contract as it appears in the proceedings of the Circuit Court, and we are not able to construe that contract in the manner that the judge of the Circuit Court must have construed it in order to have ruled as he did on the admission of evidence, and to give the instruction embraced in this charge to the jury.

It appears on the face of the paper declared on that plaintiff was injured on May 21, 1888; that the defendant verbally agreed to furnish him such supplies from the commissary as he might choose to take, to pay him regular wages while he was disabled, and to give him coal and wood for fuel at his dwelling, and the benefit of the convict garden, all of which the defendant did, or, in the language of the contract, carried out. It appears further on the face of the contract, that after the plaintiff had resumed work there was a verbal agreement made in May, 1889, between the parties to the effect that he should do such work as he could do, and that the defendant would pay him therefor $60 a month, and, in addition, free house-rent, and that this agreement was faithfully kept by both parties until June 4, 1890, when the writing declared on passed between the parties, which, after reciting the facts just stated, continues in these words, viz:

"It is mutually agreed between myself and the said company that it will be better to give me the house rent than the supplies of about equal amount from the commissary. Now, therefore, it is agreed that, in view of the above propositions which have been faithfully carried out, that my wages from this date are to be $65 per month, and, in addition, I am to have, free of charge, my coal and wood necessary for my household use at my dwelling, and the same benefit from the garden as is had

by others who are allowed the garden privilege; and I, on my part, agree and bind myself to release the said company from any and all liability for said accident, or from injuries resulting to me from it, or the effects of it, and agree that this is to be a full and satisfactory settlement of any and all claims which I might have against said company."

It will be observed that the date of this writing is more than three years removed from the date of the injury suffered by the plaintiff. By the law of Alabama, such a cause of action is subject to the plea of limitation of one year. Beside what fully appears on the face of this writing, the proof abundantly shows that the plaintiff resumed work within the first year after receiving his injury, and that he had received wages and allowances from the time of his injury up to April 1, 1891. The plaintiff contends that the last paragraph of the writing declared on shows the yielding of a consideration, which the defendant cannot restore, and that this requires that the contract shall be construed as a contract for the permanent hiring of plaintiff by the defendant. The counsel suggests that the defendant fraudulently set a trap for the plaintiff and induced him to enter into this contract, in order to escape liability for the personal injuries that plaintiff had sustained. It does not clearly appear to be that this consideration, if it was a consideration, has passed beyond the power of the defendant to restore, or of the plaintiff to claim, to the extent that he was in a condition to claim it at the date of the execution of the writing. The practical effect of the construction claimed by the plaintiff, and shown by the verdict in this case, shocks the common judgment and conscience, and to support it would require express terms in the writing. Such express terms do not appear. On the contrary, to us it appears that the de-

fendant had been dealing tenderly with the plaintiff, on account of the very severe injuries which the plaintiff had received in the defendant's service; that, while all along denying its liability for those injuries, it had done what it could to alleviate them, and this condition of friendly accord had progressed for more than three years. Plaintiff probably reiterating his claim against the defendant for the injuries, or dwelling upon it, and the defendant desiring to have the relations between the parties put upon a business basis, it was certainly not a matter of small consequence to the plaintiff to secure the employment which in this written agreement the defendant expressed itself willing to continue. The proof shows that the service the plaintiff could render and was rendering, and had been rendering for two years after his wounds had healed, was reasonably worth about the wages and the allowances which the defendant consented to give. It shows also that he was not quite as efficient as a man with two good hands and two sound legs, would have been with like skill and experience, but, to our minds, there is nothing on the face of this paper indicates that the defendant, for a disputed claim that was thrice barred, was willing to give, or was giving, a binding contract to pay an annuity to a man fifty-five years old, at the rate of $840 a year, as long as he should live. His disability was fixed more than two years before the date of this writing. Exactly how much he was disabled was known not only to him but to the defendant. It is easier to say what the contract does not mean than to declare authoritatively and clearly what is the proper construction of the contract. The defendant contends that it is an employment by the month, and, like every other such employment, subject to be discontinued, at the will of either, at the expiration of any month, or at any time for adequate cause. This construction comports more with the terms of the

writing itself, and we conclude it is the only intelligible construction to be put upon the writing.

It appears to us that the plaintiff has been led into this contract and into the loss of valuable employment, by his own misconstruction of the contract. His own testimony on the trial of this case showed clearly that in his dealings with the agent of the defendant he relied upon the unfounded belief that he had the defendant bound to pay him an annuity of $70 a month for the rest of his life, and that he could work, or not, and as he pleased—a kind of servant that would not be very valuable to any employer.

We conclude that the demurrer to the declaration should have been sustained; and for the error of the court in overruling the demurrer—without further comment on other errors indicated.

The judgment of the Circuit Court is reversed, and the cause is remanded to be proceeded with in that court in accordance with the views we have expressed.

PARDEE, J., dissents.

I, J. M. McKee, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the foregoing pages numbered from 71 to 82, inclusive, contains a true and correct transcript of all the orders, opinions and decrees entered in said United States Circuit Court of Appeals in the cause lately pending therein wherein the Tennessee Coal, Iron & Railroad Company were plaintiff in error and Frank H. Pierce was defendant in error. No. 590, as fully and completely as the same now remains of record in my office.

Given under my hand and the Seal of the United States Circuit Court of Appeals hereto
[L. S.] affixed at the City of New Orleans this 6th day of September, A. D. 1897.

J. M. McKEE,
Clerk.

84 In Circuit Court of Appeals for the Fifth Circuit.

TENNESSEE COAL, IRON AND RAILROAD COMPANY, Plaintiff in Error,
vs.
FRANK H. PIERCE, Defendant in Error.

FRANK H. PIERCE, Plaintiff in Error,
vs.
TENNESSEE COAL, IRON AND RAILROAD COMPANY, Defendant in Error.

Agreement as to Return to Writ of Certiorari.

It is agreed between counsel for the respective parties in the above-entitled causes that the clerk of the circuit court of appeals may return this agreement, together with an agreement between the parties hereto, filed in the circuit court of appeals for the fifth circuit, amending the record in that court in certain particulars therein set out, as his return to the writ of certiorari from the Supreme Court of the United States to the circuit court of appeals for the fifth circuit, and it is agreed between the parties hereto that the record filed with the petition for the writ of certiorari in the Supreme Court of the United States by counsel for petitioner, together with the agreement filed in the circuit court of appeals for the fifth circuit for the amendment of the printed record in certain particu-
85 lars, be, and they do hereby, constitute the record of the above-entitled causes in the Supreme Court of the United States for all purposes whatsoever.

In witness whereof we have hereto set our hands this 22nd day of November, 1897.

W. A. GUNTER,
ROBERT C. REDUS,
Attorneys for Frank H. Pierce.
WALKER PERCY,
WM. I. GRUBB,
Attorneys for Tennessee Coal, Iron & Railroad Company.

Endorsed: Agreement as to return to certiorari. Filed Nov. 26, 1897. J. M. McKee, cl'k.

86 FRANK H. PIERCE
vs.
TENNESSEE COAL, IRON AND RAILROAD COMPANY.

It is agreed between counsel for each party in the above-entitled cause that the plaintiff in error in the original case shall take nothing from its exception to the introduction of the contract sued on which appears on page 33 of the record, and shall be confined in assigning error predicated on the admission of the contract sued on in evidence to the exception to the admission of said contract ap-

pearing on page 34 of the record, the first exception being a mistake which is to be corrected on the record.

It is also agreed that the record shall be considered as affirmatively showing that the demurrers of the plaintiff in error to the original complaint were reinterposed to the complaint as amended.

April 10, 1897.

W. A. GUNTER,
R. C. REDUS,
For Plaintiff Below.
WALKER PERCY,
W. I. GRUBB,
For Defendant Below.

Endorsed: No. 590. Tenn. C., I. Co. *v.* Frank H. Pierce. Agreement as to record. Filed Apr. 14, 1897. J. M. McKee, cl'k.

87 I, J. M. McKee, clerk of the United States circuit court of appeals for the fifth circuit, do hereby certify that the foregoing three pages contain true and correct copies of the agreement of counsel as to record, filed April 14, 1897, and also of the agreement of counsel as to the return to the writ of certiorari, filed November 26, 1897, in cause No. 590—Tennessee Coal, Iron and Railroad Company, plaintiff in error, *v.* Frank H. Pierce, defendant in error, and Frank H. Pierce, plaintiff in error, *v.* Tennessee Coal, Iron and Railroad Company, defendant in error—lately pending in said court, as the same now remains on file and of record in my office.

Seal United States Circuit Court of Appeals, Fifth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of New Orleans, this 7th day of December, A. D. 1897.

J. M. McKEE,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

88 UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the fifth circuit, Greeting:

Being informed that there is now pending before you a suit in which The Tennessee Coal, Iron & Railroad Company is plaintiff in error and Frank H. Pierce is defendant in error, and Frank H. Pierce is plaintiff in error and The Tennessee Coal, Iron & Railroad Company is defendant in error, which suit was removed into the said circuit court of appeals by virtue of writs of error to the circuit court of the United States for the northern district of Alabama, and we being willing for certain reasons that the said cause

and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme
89 Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 19th day of October, in the year of our Lord one thousand eight hundred and ninety-seven.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

90 [Endorsed:] Supreme Court of the United States. No. 469. October term, 1897. Frank H. Pierce *vs.* The Tennessee Coal, Iron & R. R. Co. Writ of certiorari. Filed Nov. 26, 1897. J. M. McKee, cl'k.

United States Circuit Court of Appeals, Fifth Circuit.

I, J. M. McKee, clerk of the United States circuit court of appeals for the fifth circuit, do hereby make as a return to this writ the certified copy hereto attached of the agreement of counsel filed in said United States circuit court of appeals in the within-named cause on the 26th day of November, 1897, and as a further return, as required by the above-mentioned agreement, do hereto attach a certified copy of the agreement of counsel filed in said cause on the 14th day of April, 1897.

Seal United States Circuit Court of Appeals, Fifth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of New Orleans, this 7th day of December, A. D. 1897.

J. M. McKEE,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

91 [Endorsed:] Case No. 16,682. Supreme Court U. S., October term, 1898. Term No., 174. Frank H. Pierce, petitioner, *vs.* The Tennessee Coal and Iron Company. Writ of certiorari and return. Filed Dec. 10, 1897.

Office Supreme Court, U. S.
FILED
OCT 9 1897
JAMES H. McKENNEY,
CLERK.

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In Supreme Court United States.

OCTOBER TERM, 1897.

Ex parte FRANK H. PIERCE.

Petition and Argument for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

In United States Supreme Court.

OCTOBER TERM, 1897.

Ex parte FRANK H. PIERCE.

The petition of Frank H. Pierce, respectfully shows:

I. That, being a citizen of Alabama, on the 22 January, 1892, he brought suit, in the Circuit Court of Jefferson county, for that State, against The Tennessee Coal, Iron and Railroad Company, a corporation, for damages for breach *in toto* of a contract in writing entered into between said defendant and petitioner. The said contract so sued on is set out in the complaint filed, which is shown on pages 13-14 of the record filed herewith.

II. That said defendant appeared in said cause and filed demurrers to the complaint—and the demurrers were sustained by said Circuit Court—and, your petitioner standing upon his complaint as filed and refusing to amend, final judgment was rendered in favor of the said defendant.

See demurrers, Record 17; Judgment, p. 18.

IIII. That petitioner appealed said cause to the Supreme Court of Alabama, when the cause coming on regularly to be heard, the said judgment was in all things reversed, The said Supreme Court holding, after full argument, that said contract so sued "bound the defendant to its performance, so long as plaintiff should be disabled by reason of the injuries he re-

ceived, which under the averment that he was permanently disabled, will be for life."

The opinion of said court is reported in 110 Ala. Rep., 533.

IV. That said cause being remanded to said Circuit Court of Jefferson county to be proceeded with in accordance with the ruling of the Supreme Court, the said defendant, norminally on the ground of local prejudice but really to avoid the effect of said ruling, had said cause removed to the Circuit Court of the United States for the Southern Division of the Northern District of Alabama, upon the petition and proceedings shown in the record herewith filed, pages 1 to 21.

V. That petitioner moved said Circuit Court of the United States to remand said cause to the State Court, but said motion was refused.

See Record, 21-22.

That afterwards said cause came on to be heard and petitioner recovered a judgment against defendant for the sum of $5,893.00.

VI. That the plaintiff and defendant each took a bill of exceptions and appealed by writ of error from the said judgment to the United States Circuit Court of Appeals for the Fifth Circuit—and that said cause came on to be heard in June, 1897, and on such hearing the said United States Circuit Court of Appeals rendered a judgment and filed an opinion therein, shown in the record herewith filed, holding that petitioner had shown no cause of action in his said complaint, and that the demurrers interposed in the State Court and which were overruled by the State Supreme Court and which were allowed, against petitioner's objection, to be reconsidered in the said Circuit Court of the United

States, were good, and directed the said Circuit Court of the United States to dismiss thereon petitioner's said action.

VII. That said cause has been remanded to said Circuit Court of the United States to be proceeded with in accordance with the said judgment of the Appellate Court and will be dismissed at the approaching term of said court, unless restrained by the order of this court.

VIII. That the said defendant below did not, as required by law in the case of removal of causes, file a full and complete transcript of the record and proceedings of the State Court in said cause, but omitted therefrom all the proceedings of the said Supreme Court of the State therein. That nevertheless, although said omission was shown on the record produced and filed by said defendant, (See Record, p. 20) the said Circuit Court of the United States refused to remand the same to the State Court and retained jurisdiction of said cause, as did the said Circuit Court of Appeals, giving the said defendant the benefit of the omission by its own fault of said proceedings in the Supreme Court from the record, so as to avoid the estoppel thereof against the said defendant. Nevertheless, in the argument of said cause by counsel, both in the lower and appellate courts, the fact of said proceedings in the Supreme Court of the State were conceded and the opinion of said Supreme Court was attempted to be avoided by insisting that it was not binding on the Federal Court and also that the amendment of the complaint in the Circuit Court of the United States shown on page 25 of the record, stated a new cause of action, whereas said amendment in no manner changed the substance of the contract declared on and construed by the State Supreme Court.

Inasmuch as petitioner is without other remedy, and as he is entitled to the benefit of the construction of his said contract by the Supreme Court of the State of Alabama, he prays that this Honorable court will grant to him a writ of *certiorari* directed to the said Honorable United States Circuit Court of Appeals for the Fifth Circuit, commanding it to certify to this court the record and proceedings in said cause of the Tennessee Coal, Iron & Railroad Company, plaintiff in error versus Frank H. Pierce, defendant in error, and of Frank H. Pierce, plaintiff in error versus Tennessee Coal, Iron & Railroad Co., defendant in error, that full and ample justice may be done in the premises by the review thereof by this Honorable court, which petitioner prays may be had and done. And petitioner will ever pray.

FRANK H. PIERCE,
per W. A. GUNTER, his Attorney.

UNITED STATES OF AMERICA,
Middle District of Alabama.

William A. Gunter, being duly sworn, doth depose and say:

I was the attorney for said Frank H. Pierce in said suit above mentioned, and conducted the same for him throughout all the proceedings therein up to this application, and I know and state that the matters set forth in the foregoing petition of said Frank H. Pierce are true as therein stated.

Sworn to and subscribed before me, J. W. Dimmick, ~~U. S. Commissioner~~ and Clerk of U. S. Court for the Middle Dist. of Ala., this 9 day of Sept, 1897.

W. A. GUNTER.

In Supreme Court United States.

OCTOBER TERM, 1897.

Ex parte FRANK H. PIERCE.

Brief for Petitioner by W. A. GUNTER.

Statement of the Case.

Pierce sued in the State Circuit Court upon a contract set out in the complaint, Record, p. 13; the defendant, the Tennessee Coal Iron & Railway Co. demurred. The court sustained the demurrer, the plaintiff refused to plead over and judgment went for defendant. On appeal this judgment was reversed, the court construing the contract sued on to the effect that plaintiff had stated a good cause of action and that defendant was bound by the contract to pay the monthly payments stipulated to be paid as long as plaintiff was disabled, and if he was permanently disabled as alleged that it would be for life. The case is reported in 19 South. Rep. 22 and 110 Ala. 533. When the case went back to the State Circuit Court the defendant below removed it to the Circuit Court of the United States sitting at Birmingham, Ala., on the ground nominally of local prejudice, but really to escape the decision of the Supreme Court of the State. The defendant omitted from the transcript filed in the Circuit Court of the United States, all the proceedings

in said case in the Supreme Court, and, though such omission was apparent from the record filed (see Record, p. 20), the said Circuit Court refused petitioner's motion to remand said cause to the State Court, and retained jurisdiction thereof, as did said Appellate Court. Record, p. 21.

The defendant insisted that the same demurrers decided by the Supreme Court of the State Court should be retried by the Circuit Court of the United States and they were so retried and overruled. Record, p. 28.

The plaintiff amended the complaint by inserting in the contract a line omitted in copying but not altering the legal effect and substance of the contract. (See Record, pp. 25-6 for amendment). The defendant interposed same demurrers and they were again overruled. Record, p. 28.

The case then went to trial and plaintiff had judgment for $5,893.00—and both parties brought same to the Circuit Court of Appeals.

The Appellate Court held that the demurrers which had been overruled by the Supreme Court of the State were good and directed the Circuit Court to dismiss the case thereon.

It is deemed unnecessary to state more of the case on this application, since the only available ground to be urged in a case of this kind for the writ of *certiorari* is the retention of jurisdiction in the absence of a full record from the State Court, by the fault of the party removing the case, or the refusal to respect and observe the *res judicata* of the case established by the decision of the State Supreme Court.

If the court can and will regard the proceedings in the State Supreme Court as part of the case, as was done in Forsyth v. Hammond, 166 U. S. 506, petitioner would prefer the case to remain and be tried in this jurisdiction.

ARGUMENT.

The defendant below having had a trial in the State Court on its demurrers, the construction placed upon the contract, which was directly involved in the demurrer, became the law of the case which followed it when it was removed to the Federal Court.

Davis v. St. Louis, etc., 25 Fed. Rep. 786.
Cleaver v. Traders Ins. Co. 40 Fed. Rep. 863.
Williams v. Conger, 125 U. S. 397-418.
Ib. 40 Fed. Rep. 711 and cases there cited.
Northern Pac. R. R. Co. v. Ellis, 144 U. S. 458.
Clark v. Keith, 106 U. S. 464.

The reversal and judgment by the State Court stood as if by this court. The amendment of the complaint did not affect the substance of the contract since it consisted only of the addition of an alternative clause in the recitals of the contract anterior to the contractual part. See amendment, Record, p. 25. The *res judicata* was therefore complete.—Ib.

The proceedings in the State Supreme Court were treated by the courts and counsel as in the case—they were omitted from the transcript by the fault of the party removing the cause, who therefore, cannot take advantage of its own wrong. This court may, like the other courts, look at these proceedings and measure the parties rights by them. It is no objection to granting the writ prayed, that the lower court has not yet obeyed the injunction of the Appellate Court to dismiss petitioner's cause.

Forsyth v. Hammond, 166 U. S. 506.
Am. Const. Co. v. Jacksonville Rw., 148 U. S. p. 384.
The Conqueror, 166 U. S. 110.
The Three Friends, 166 U. S. 1.

It is against public policy and the regularity of judicial procedure to permit parties, on any pretense, to escape the *res judicata* of one jurisdiction by a removal of the cause into the Federal Courts, and for the latter courts not to observe and respect the decisions of the State Courts.

This case, therefore, seems to fall directly within the rules regulating the granting of the writ of *certiorari* as stated in Forsyth's case at pages 514-15 of 166 U. S. Rep.

W. A. GUNTER,
Atty. for Petitioner.

W. A. Gunter
Atty for petitioner

Brief of Petition for Writ of Certiorari

Filed Oct 9, 1897

OCT 9 1897
JAMES H. MCKENNEY
CLERK

169

In Supreme Court United States.

OCTOBER TERM, 1897.

In re FRANK E. PERCE.

Petition and Argument for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

In United States Supreme Court.

OCTOBER TERM, 1897.

Ex parte **FRANK H. PIERCE.**

The petition of Frank H. Pierce, respectfully shows:

I. That, being a citizen of Alabama, on the 22 January, 1892, he brought suit, in the Circuit Court of Jefferson county, for that State, against The Tennessee Coal, Iron and Railroad Company, a corporation, for damages for breach *in toto* of a contract in writing entered into between said defendant and petitioner. The said contract so sued on is set out in the complaint filed, which is shown on pages 13-14 of the record filed herewith.

II. That said defendant appeared in said cause and filed demurrers to the complaint—and the demurrers were sustained by said Circuit Court—and, your petitioner standing upon his complaint as filed and refusing to amend, final judgment was rendered in favor of the said defendant.

See demurrers, Record 17; Judgment, p. 18.

IIII. That petitioner appealed said cause to the Supreme Court of Alabama, when the cause coming on regularly to be heard, the said judgment was in all things reversed, The said Supreme Court holding, after full argument, that said contract so sued "bound the defendant to its performance, so long as plaintiff should be disabled by reason of the injuries he re-

ceived, which under the averment that he was permanently disabled, will be for life."

The opinion of said court is reported in 110 Ala. Rep., 533.

IV. That said cause being remanded to said Circuit Court of Jefferson county to be proceeded with in accordance with the ruling of the Supreme Court, the said defendant, norminally on the ground of local prejudice but really to avoid the effect of said ruling, had said cause removed to the Circuit Court of the United States for the Southern Division of the Northern District of Alabama, upon the petition and proceedings shown in the record herewith filed, pages 1 to 21.

V. That petitioner moved said Circuit Court of the United States to remand said cause to the State Court, but said motion was refused.

See Record, 21-22.

That afterwards said cause came on to be heard and petitioner recovered a judgment against defendant for the sum of $5,893.00.

VI. That the plaintiff and defendant each took a bill of exceptions and appealed by writ of error from the said judgment to the United States Circuit Court of Appeals for the Fifth Circuit—and that said cause came on to be heard in June, 1897, and on such hearing the said United States Circuit Court of Appeals rendered a judgment and filed an opinion therein, shown in the record herewith filed, holding that petitioner had shown no cause of action in his said complaint, and that the demurrers interposed in the State Court and which were overruled by the State Supreme Court and which were allowed, against petitioner's objection, to be reconsidered in the said Circuit Court of the United

States, were good, and directed the said Circuit Court of the United States to dismiss thereon petitioner's said action.

VII. That said cause has been remanded to said Circuit Court of the United States to be proceeded with in accordance with the said judgment of the Appellate Court and will be dismissed at the approaching term of said court, unless restrained by the order of this court.

VIII. That the said defendant below did not, as required by law in the case of removal of causes, file a full and complete transcript of the record and proceedings of the State Court in said cause, but omitted therefrom all the proceedings of the said Supreme Court of the State therein. That nevertheless, although said omission was shown on the record produced and filed by said defendant, (See Record, p. 20) the said Circuit Court of the United States refused to remand the same to the State Court and retained jurisdiction of said cause, as did the said Circuit Court of Appeals, giving the said defendant the benefit of the omission by its own fault of said proceedings in the Supreme Court from the record, so as to avoid the estoppel thereof against the said defendant. Nevertheless, in the argument of said cause by counsel, both in the lower and appellate courts, the fact of said proceedings in the Supreme Court of the State were conceded and the opinion of said Supreme Court was attempted to be avoided by insisting that it was not binding on the Federal Court and also that the amendment of the complaint in the Circuit Court of the United States shown on page 25 of the record, stated a new cause of action, whereas said amendment in no manner changed the substance of the contract declared on and construed by the State Supreme Court.

Inasmuch as petitioner is without other remedy, and as he is entitled to the benefit of the construction of his said contract by the Supreme Court of the State of Alabama, he prays that this Honorable court will grant to him a writ of *certiorari* directed to the said Honorable United States Circuit Court of Appeals for the Fifth Circuit, commanding it to certify to this court the record and proceedings in said cause of the Tennessee Coal, Iron & Railroad Company, plaintiff in error versus Frank H. Pierce, defendant in error, and of Frank H. Pierce, plaintiff in error versus Tennessee Coal, Iron & Railroad Co., defendant in error, that full and ample justice may be done in the premises by the review thereof by this Honorable court, which petitioner prays may be had and done. And petitioner will ever pray.

FRANK H. PIERCE,
per W. A. GUNTER, his Attorney.

UNITED STATES OF AMERICA,
Middle District of Alabama.

William A. Gunter, being duly sworn, doth depose and say:

I was the attorney for said Frank H. Pierce in said suit above mentioned, and conducted the same for him throughout all the proceedings therein up to this application, and I know and state that the matters set forth in the foregoing petition of said Frank H. Pierce are true as therein stated.

Sworn to and subscribed before me, J. W. Dimmick, ~~U. S. Commissioner~~ and Clerk of U. S. Court for the Middle Dist. of Ala., this 9 day of August, 1897.

W. A. GUNTER.

In Supreme Court United States.

OCTOBER TERM, 1897.

Ex parte FRANK H. PIERCE.

Brief for Petitioner by W. A. GUNTER.

Statement of the Case.

Pierce sued in the State Circuit Court upon a contract set out in the complaint, Record, p. 13; the defendant, the Tennessee Coal Iron & Railway Co. demurred. The court sustained the demurrer, the plaintiff refused to plead over and judgment went for defendant. On appeal this judgment was reversed, the court construing the contract sued on to the effect that plaintiff had stated a good cause of action and that defendant was bound by the contract to pay the monthly payments stipulated to be paid as long as plaintiff was disabled, and if he was permanently disabled as alleged that it would be for life. The case is reported in 19 South. Rep. 22 and 110 Ala. 533. When the case went back to the State Circuit Court the defendant below removed it to the Circuit Court of the United States sitting at Birmingham, Ala., on the ground nominally of local prejudice, but really to escape the decision of the Supreme Court of the State. The defendant omitted from the transcript filed in the Circuit Court of the United States, all the proceedings

in said case in the Supreme Court, and, though such omission was apparent from the record filed (see Record, p. 20), the said Circuit Court refused petitioner's motion to remand said cause to the State Court, and retained jurisdiction thereof, as did said Appellate Court. Record, p. 21.

The defendant insisted that the same demurrers decided by the Supreme Court of the State Court should be retried by the Circuit Court of the United States and they were so retried and overruled. Record, p. 28.

The plaintiff amended the complaint by inserting in the contract a line omitted in copying but not altering the legal effect and substance of the contract. (See Record, pp. 25-6 for amendment). The defendant interposed same demurrers and they were again overruled. Record, p. 28.

The case then went to trial and plaintiff had judgment for $5,893.00—and both parties brought same to the Circuit Court of Appeals.

The Appellate Court held that the demurrers which had been overruled by the Supreme Court of the State were good and directed the Circuit Court to dismiss the case thereon.

It is deemed unnecessary to state more of the case on this application, since the only available ground to be urged in a case of this kind for the writ of *certiorari* is the retention of jurisdiction in the absence of a full record from the State Court, by the fault of the party removing the case, or the refusal to respect and observe the *res judicata* of the case established by the decision of the State Supreme Court.

If the court can and will regard the proceedings in the State Supreme Court as part of the case, as was done in Forsyth v. Hammond, 166 U. S. 506, petitioner would prefer the case to remain and be tried in this jurisdiction.

ARGUMENT.

The defendant below having had a trial in the State Court on its demurrers, the construction placed upon the contract, which was directly involved in the demurrer, became the law of the case which followed it when it was removed to the Federal Court.

Davis v. St. Louis, etc., 25 Fed. Rep. 786.
Cleaver v. Traders Ins. Co. 40 Fed. Rep. 863.
Williams v. Conger, 125 U. S. 397-418.
Ib. 40 Fed. Rep. 711 and cases there cited.
Northern Pac. R. R. Co. v. Ellis, 144 U. S. 458.
Clark v. Keith, 106 U. S. 464.

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The proceedings in the State Supreme Court were treated by the courts and counsel as in the case—they were omitted from the transcript by the fault of the party removing the cause, who therefore, cannot take advantage of its own wrong. This court may, like the other courts, look at these proceedings and measure the parties rights by them. It is no objection to granting the writ prayed, that the lower court has not yet obeyed the injunction of the Appellate Court to dismiss petitioner's cause.

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The Conqueror, 166 U. S. 110.
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It is against public policy and the regularity of judicial procedure to permit parties, on any pretense, to escape the *res judicata* of one jurisdiction by a removal of the cause into the Federal Courts, and for the latter courts not to observe and respect the decisions of the State Courts.

This case, therefore, seems to fall directly within the rules regulating the granting of the writ of *certiorari* as stated in Forsyth's case at pages 514-15 of 166 U. S. Rep.

W. A. GUNTER,
Atty. for Petitioner.

W. A. Gunter
Atty for petitioner

In Supreme Court of the United States

OCTOBER TERM, 1898.

No. 174.

FRANK H. PIERCE, *Petitioner*,

versus

THE TENNESSEE COAL, IRON & RAILROAD COMPANY.

On Writ of Certiorari to the United States Circuit Court Appeals for the Fifth Circuit.

Argument for F. H. Pierce on his Writ of Error and on the Writ of Error of the Tenn. C., Iron & R. R. Co., by W. A. GUNTER.

AS TO THE CERTIORARI.

This writ having been awarded on a printed argument, we beg to refer to that for the matters connected with the granting of the writ. We suppose that the propriety of granting the writ is no longer a question in the case, and we do not discuss it further.

STATEMENT OF THE CASE.

This was an action brought in the State Circuit Court, by Pierce, against the Tennessee Coal, Iron & R. R. Co., for damages for the breach of a contract set out in the complaint.

The defendant demurred to the complaint, the court sustained the demurrer, and the plaintiff refusing to plead over, judgment went for the defendant. On appeal to the Supreme Court of the State,

this ruling was reversed. The case is reported in 19 South. Rep. 21, and 110 Ala. 533.

When the case went back to the Circuit Court the defendant had it removed to the Federal Court, on the ground that there was no chance for it to obtain justice in any State court open to it.

On the trial in the Federal Circuit Court the plaintiff had judgment for $5,893.00, and each party brought a writ of error.

The nature of the case is this: Pierce, being in in the employment of the defendant corporation, was seriously injured in May, 1888, by a train of cars operated by defendant in a coal mine. In compromise and settlement of the claim for damages, the defendant entered into the contract sued on—to give Pierce such work as he could do in his disabled condition, and to pay him $65 per month in money and certain supplies, valued as at least worth $5 per month—bnt soon discharged him, insisting that ihe hiring was at the will of the defendant.

The suit is for damages, *in solido*, for the renunciation and total breach of the contract by the defendant. The contract is set out in the complaint in these words:

"4th of June, 1890. Whereas, I, F. H. Pierce, while in the employ of the Tennessee Coal, Iron & Railroad Company, Pratt Mines Division, as a machinist, was seriously hurt by a trip of tram cars on the main slope of the mine, known as Slope No. 2, and operated by the Tennessee Coal, Iron & Railroad Company, under circumstances which I claim render the said Company liable to me for damages; but, whereas, they disclaim any liability for said accident or injuries to me resulting from same, and both parties being desirous of settling and compromising said matter; and, whereas, the said Tennessee Coal, Iron & Railroad Company did make me a proposition on the — day of November, 1888, said accident having occurred on the 21st day of May, 1888, that they would furnish me such sup-

plies from the commissary at No. 2 prison as I might choose to take, pay me regular wages while I was disabled, and give me my coal and wood for fuel at my dwelling and the benefit of the convict garden at No. 2; and, whereas, said proposition was accepted by me and carried out by said Company; and, whereas, in May, 1889, after I had resumed work, a further proposition was made to give me work, such as I could do, paying me therefor the wages paid me before said accident—that is, $60 a month—and, in addition, free house rent; *or in lieu of house rent, a certain amount of supplies from the convict commissary at No. 2 prison, which supplies were to amount to about the sum paid me for house rent;* and, whereas, said agreement has been faithfully kept by both parties; and, whereas, on the 4th day of June, 1890, it is mutually agreed between myself and the said Company that it will be better to give me the house rent than the supplies of about equal amount from the commissary. Now, therefore, it is agreed that, in view of the above propositions which have been faithfully carried out, that my wages from this date are to be $65 per month, and, in addition, I am to have, free of charge, my coal and wood necessary for my household use at my dwelling, and the same benefit from the garden as is had by others who are allowed the garden privilege, and I, on my part, agree and bind myself to release the said Company from any and all liability for said accident or injuries resulting to me from it, or from the effects of it, and agree that this is to be full and a satisfactory settlement of any and all claims which I might have against said Company.

F. H. Pierce,
G. B. McCormack.

Witness: P. J. Rogers,
Erskine Ramsey."

The demurrers interposed in the State Court, as shown at large on page 17 of the record, resolved themselves into two propositions:

1st. That the contract fixed no time of performance, and was a contract of hiring determinable at the will of either party.

2nd. That the contract shows it was not entered into by defendant, but by plaintiff and G. B. McCormack.

The Supreme Court held that there was no merit in either of these contentions. 19 So. Rep. 22; 110 Ala. 533.

When the case came on to be heard in the Federal Circuit Court the defendant insisted that the court should pass again on its demurrers, which had been overruled in the Supreme Court, and accordingly the court reheard and overruled those demurrers.

Record 28.

The plaintiff then amended his complaint by inserting in the contract a clause left out in copying. This clause is shown above in copy of contract by italics.

The defendant again interposed the same demurrers and the court again overruled them.

Record 28.

The defendant then interposed four pleas, shown on pages 24, 25 and 27 of the record.

The plaintiff joined issue on the 1st, 3rd and 4th and demurred to the 2nd plea, and the demurrer was sustained.

The second plea, in short, is that the plaintiff, after service under the contract, refused to further perform, and that defendant thereupon discharged him.

Record 24.

The demurrer is that the plea did not go to the whole consideration of the contract, and was no answer to the entire action.

Record 26.

The case was then tried upon the first plea, which was the general issue, the third, which was *non est factum*, and the fourth, which was one of recoupment for damages sustained by the loss of plaintiff's service under the contract.

ERRORS RELIED ON ON PIERCE'S WRIT OF ERROR IN THE APPELLATE COURT, ALSO HERE.

Although there are four assignments of error by Pierce, Record 65, they all substantially involve a single point, viz:

The right of the plaintiff to recover full and final damages for the total renunciation of the contract by the defendant. The defendant was to pay plaintiff during his disability, which under the evidence was permanent, the sum of sixty-five dollars per month in money, and supplies, which were conceded to be worth five dollars per month—total, seventy dollars—and, having renounced the contract, plaintiff sought to recover damages beyond the day of trial for the expectancy of his life. The court, however, refused to admit, and, on motion of defendant, excluded all evidence on the trial showing the plaintiff's expectancy of life; that is, evidence as to the plaintiff's age, health, habits, and the American tables of mortality, used by insurance companies, showing the expectancy of life at different ages, on the ground, as announced by the court, "that it would allow no recovery on the contract beyond the installments of wages due and in default up to the date of the trial, . . . because damages for the expectancy of life was a matter too vague and uncertain to be allowed."

Record 61-2.

The bill of exceptions, Record 61, on this point, is as follows:

"The plaintiff also introduced evidence showing that the plaintiff at the time of his discharge by defendant from its employment in May, 1891, was 55

years old, that he was then, and has been since, in good health, and that he was addicted to no habits of drinking or otherwise affecting his health and expectancy of life, and introduced the American tables of mortality used by insurance companies, showing the expectancy of life of plaintiff at the time of his discharge from defendant's employment, and at the time of the trial."

The same point was also raised in the written charges refused to the plaintiff below. There are two of these charges, but, as they cover the same ground, only one will be quoted. No. 2 is as follows:

"If the defendant, after making the contract sued on, and before the suit, refused further to pay the plaintiff and to furnish the articles stipulated to be furnished, and refused to employ the plaintiff and discharged him, the plaintiff is entitled to the full benefit of his contract, which is the present value of the money agreed to be paid and the articles to be furnished under the contract for the period of his life, if his disability is permanent, less such sum as the jury may find the plaintiff may be able to earn in the future, and may have been able heretofore to earn, and less such loss as defendant may have sustained from the loss of plaintiff's service without defendant's fault."

Record 63.

It is insisted that the circuit court erred in excluding the evidence shown above to have been excluded, and in refusing the charge quoted above, and that the appellate court erred in not reversing the case for the error.

LAW POINT.

On the total renunciation of a contract by a party thereto, the person against whom it is renounced, if in other respects entitled to damages, is entitled to recover full and final damages in one action.

And if the contract is for the payment of money during the life of a person, the damage recoverable is the present worth of the money so to be paid during the expectancy of life of such person, to be estimated upon and in view of all the matters which enter into a correct estimate of life, such as the health, age and habits of the person, and human experience on such subject shown in the standard tables of mortality.

Schell v. Plumb, 55 N. Y. 592.
Howard v. Turner, 71 Ala. 434.
3 Ency. of Law, 1 ed. 904-6.
Nicksburg v. Putnam, 118 U. S. p. 534.
Frazier v. E. T., V. & G. R. R., 12 S. W. Rep. 537.
Shover v. Myrick, 30 N. E. Rep. 207.
Penn. Co. v. Dolan, 32 N. E. Rep. 804.
Kentucky Cement Co. v. Cleveland, 30 N. E. Rep. 802.

ARGUMENT.

The plaintiff below would be very well content for his recovery to be limited, as Judge Boarman limited it, to the installments due and unpaid up to the date of the trial, if the law permitted him to sue for future installments. But, as there can be but one recovery on a suit for a total breach and renunciation of a contract, the plaintiff thinks it unreasonable to confine the recovery to amounts past due at the date of the trial.

We can imagine a contract to pay any amount per annum for a very long time, or for a given life, in which the full consideration has been received in advance for all the payments which are to follow. And there may be an absolute renunciation and total breach of the contract before the first payment is made. And, on suit brought, would it not be the height of injustice to say that the plaintiff, who has parted with the equivalent of all the payments, shall have back, as full damages, only the first in-

stallment, or such as happen to be due up to the trial?

The court seemed to think, and so decided, that "damages for the expectancy of life was a matter too vague and uncertain to be allowed."

Record 62.

Here was a man who, by contract, founded on sufficient, and therefore adequate, consideration, was entitled to seventy dollars per month for life, and, when he sues for a total breach, the court says: "You may recover seventy dollars, if that is the amount past due when the trial is had, but there is no human experience by which we can determine your probable life so as to give you the present worth of all the payments you would receive under your contract, and, therefore, you must take seventy dollars, or such sum as is due under the contract at the trial, in full satisfaction."

Does not every man and every court in the world habitually and constantly act on the exact reverse of this, as being entirely feasible and a necessary concomitant of human transactions? When a horse is valued, does not the jockey look first at his teeth to determine his probable expectancy of life, and carry forward that information as a factor in solving the problem of the present worth of the annual services of a horse of that expectancy in the business for which he is suited?

So when a life is insured, is not the same enquiry made, and is not the premium regulated by the expectancy of life of the insured? Does not each party to the contract calculate fully, and, in general, with accuracy, how long premiums will be paid, and when the policy will fall in?

And so, when this identical contract was entered into, if we suppose it to have been between men capable of such simple calculations, which we are obliged to assume, we are forced to the conclusion that Pierce accurately or roughly estimated his probable life and the payments he would receive

under his contract for the consideration paid for it; and, on the other hand, that the defendant corporation, making the same calculation, balanced the amount thus estimated to be paid to Pierce against what Pierce was to render as its equivalent, and that each, well knowing the consideration on each side, made the engagements shown by the contract.

Notes to Carnig v. Carr, 35 L. R. A. 575.

Now, when one party receives its consideration and renounces the contract on its part, and a suit for damages or compensation is brought, are the courts unable to unravel the very transaction the parties made? Where is there such vagueness and uncertainty in the matter that it is incomprehensible to the science of the law and beyond the grasp of even average jurors?

In truth, there never was a simpler problem before a jury. Can not the experience of man furnish data sufficient to say, what will be the probable duration of the life of a person of a given age, in a healthy district, in good health and of good habits, and who has secured subsistence of seventy dollars per month for life? How is the value of annuities calculated? And was not Pierce's contract a plain annuity of seventy dollars per month for life?

How is a dower interest ever reduced to a money value, or a remainderman's interest calculated, but on the theory of the simple problem here involved, open to the understanding of every man?

The authorities are equally plain on this matter.

The object of awarding damages for breach of a contract, or for an ordinary tort, is to afford compensation for the injury. And the usual measure of the damage upon a breach of contract is "the amount that would have been received if the contract had been kept."

Benjamin v. Hilliard, 23 How. 149-167.

"In an action for a personal injury" (and *a fortiori* for breach of contract), "the plaintiff is entitled

to recover compensation, so far as it is susceptible of an estimate in money, for the loss and damage caused to him by defendant's negligence."

And "in order to assist the jury in making such estimate" (that is, of what plaintiff would otherwise have earned in his trade or profession, and has been deprived of the capacity of earning by the wrongful act of the defendant), "standard life and annuity tables, showing at any age the probable duration of life, and the present value of a life annuity are competent evidence."

Vicksburg, &c., v. Putnam, 118 U. S. p. 534.

In the case of The D. S. Gregory, 7 Fed. Cases 1122, affirmed in 9 Wall. 513, the plaintiff was injured by a collision of two vessels and sued for her damages, and not on a contract adjusting the damages, as here, and she was allowed to show her age, her health, and the expectancy of her life by the mortuary tables, and her earnings per month. The court thus makes the simple calculation: "She was receiving, at the time, $12 per month and her board, as wages. She was a competent and faithful person, and capable of continuing to earn that amount. She can no longer earn it. . . . This, then, is a loss to her of $144 a year and her board, which it is reasonable to put at $6 a week or $312 a year, making a total of $456 a year. The libellant was, at the time of the accident, about forty years of age. The sum required, according to the Northhampton tables, to produce, at that age, an annuity, for life, of $456 is $4,881.48. . . . Thus much the libellant is entitled to recover, as if she were a portion of the cargo of the ferry boat, which its owner is entitled to have restored, repaired and replaced in the condition in which it was at the time of the collision."

In the case at bar, the defendant and plaintiff below adjusted and merged the claim for damages by the latter into the engagement by the former to pay $70 per month for life of plaintiff, and the question

here is, whether we cannot as well calculate the sum required to produce, at the plaintiff's age, an annuity of $70 per month for his life, as the court and jury could calculate the damage of the plaintiff, in the case of 7 Fed. Cases *supra*, who was receiving in monthly installments, but for life, wages of $144 and supplies of $312 per annum?

We are unable to discover any difference whatever in the principles involved in the problem of the two cases, and we can discern nothing in the case at bar to make us unequal to the undertaking, so easily solved by Judge Blatchford in the other case.

It is perhaps very true that Pierce might have elected to regard the contract as alive and have sued each month during his life for the sum to be paid him by the month under the contract.

Mullaly v. Austin, 97 Mass. 30.

Liddell v. Chidester , 84 Ala. 508.

3 Ency. of Law, 1 Ed. 904–6.

But, when a contract has been renounced by one party, it is a total breach, entitling the other party to sue for and recover single damages, and, if such action is brought, as is here done, there can be but one recovery. (110 Ala. 533 ; 71 Ala. 434 ; 84 Ala. 508.) And as that recovery must, to be just, respond to, and compensate for, the entire injury, it must necessarily give the plaintiff the present worth of all the sums he would have received under the contract if it had been kept. Or, to apply the rule in this case, the value of an annuity of $70 per month for the life of the plaintiff below. The only uncertain element in the calculation is the duration of the plaintiff's life, and this is solvable by a knowledge of his health and habits and of the standard mortuary tables showing the expectancy of his life.

Foster v. Hilliard, 9 Fed. Cases 549.

Frazier v. E. T., V. & Ga. R., 12 S. W. 537.

Shover v. Myrick, 30 N. E. Rep. 207.

Penn Co. v. Dolan, 32 N. E. Rep. 804.

Kentucky Cement Co. v. Cleveland, 30 N. E. 802.
Cooke v. Cook, 110 Ala. 567.
Schell v. Plumb, 55 N. Y. 592.
Sauter v. N. Y. Central, &c., 66 N. Y. 50.
Parker v. Russell, 133 Mass. 74.
Amos v. Oakley, 131 Mass. 413.
Remelee v. Hall, 31 Vermont, 582.
Mullaly v. Austin, 97 Mass. 30.
People v. Security L. I. Co., 78 N. Y. p. 128.
Grove v. Youell, 33 L. Rep. Annotated 297–9.
Kinney v. Folkerts, 48 N. W. Rep. 283–285.
Howard v. Turner, 71 Ala. 434.
Tenn. C., I. & R. Co. v. Pierce, 110 Ala. 533.
Fales v. Hemenway, 64 Me. 373.
3 Ency. of Law, 1 Ed. 904–6.

It is thus clear, beyond all question, that the Circuit Court erred in limiting the plaintiff's recovery to the amounts in default at the trial and in excluding evidence to show the expectancy of his life with a view of estimating the payments likely to be due under the contract in the future.

Argument on Appeal of Tennessee Coal, Iron & R. Co.

There are twenty-seven assignments of error insisted upon by the defendant below, but each assignment need not perhaps be considered separately.

If the court was correct in giving the charge shown by the sixteenth assignment, R. 53, which was that the plaintiff was entitled to recover the installments past due at the trial, many of the other questions are at once eliminated.

Demurrers to Complaint.

The defendant below had a trial on its demurrers to the complaint in the Supreme Court of the State. That court construed the contract sued on, holding that it was an engagement for life if the disability was permanent.

The lower court therefore had no right to reconsider the demurrers which had been overruled in the Supreme Court. The rule is perfectly well settled that when a cause is removed to a Federal court it stands precisely as it stood in the State court before removal. The parties stand concluded by previous proceedings as they would have stood in the State court.

Brewer, J., in Davis v. St. Louis, etc., 25 Fed. Rep. 786.

Cleaver v. Traders Ins., 40 Fed. Rep. 863-4.

Williams v. Conger, 125 U. S. 397-418.

Cleaver v. Traders Ins. Co., 40 Fed. Rep. 711, and cases there cited.

The cases in 125 U. S. 397 and 40 Fed. Rep. 711, had prior to removal been decided, as this case, in the State Supreme Court, and it is said in both of them, the last following the first, that the decision of the State Supreme Court stands precisely as the decision of the United States Supreme Court in the identical cause, and that it (the Supreme Court) would feel itself bound by the judgment, as fixing the law of the case, and would not allow it to be questioned at its bar, and much more would not allow a *lower court to review it.*

The spectacle we have presented in this case then is, that of the circuit court reviewing the judgment of *this court*, for this court stands, *quo ad hoc*, as having given the judgment of the State Supreme Court, to be seen in 19 So. Rep. 22 and 110 Ala. 533.

This court may feel complimented, however, that the circuit court sustained its interpretation of the contract as shown on the former appeal, as these demurrers were again overruled.

Record, 28.

The plaintiff inserted, by amendment, in his complaint the following clause, in the recital part of the contract, which had been omitted in copying, viz.:

"*Or in lieu of house rent, a certain amount of supplies from the convict commissary at No. 2 prison, which supplies were to amount to about the sum paid me for house rent.*" The position of this amendment in the contract is shown by the clause in italics in the contract set out on page 3 of this argument.

The defendant, mindful of the conclusiveness of the ruling of the State Supreme Court on the demurrers, sought to avoid it by re-interposing the same demurrers to the complaint as amended, on the idea that the amendment might authorize a different construction of the contract to that put upon it by the Supreme Court.

Record, 28.

The circuit court again overruled the demurrers to the complaint, and this the appellant assigns as error, No. 1½.

Record, 28 and 51.

It will be observed that the clause inserted in the contract by amendment does not, in the least, alter the *contractual* part of the contract, for the inserted clause is in the *recital* part of the instrument, stating what had before been the engagement, in one respect, of the parties, up to the 4th of June, 1890, under the contract of May 1889, viz., that Pierce should have $60 a month, and in addition free house rent. "*or in lieu of house rent*, a certain amount of supplies from the convict commissary, at No. 2 prison, which supplies were to amount to about the sum paid me for house rent."

It could not possibly make any difference, in the construction of the contract entered into on the 4th June 1890, that under the previous contract the appellant, instead of being bound to pay $60 per month *and house rent*, had an option to furnish supplies of equal value to the amount paid for house rent, instead of house rent. This matter in the contract is entirely historical and preliminary to the new engagement of 4th June 1890, by which, the option

as to supplies being eliminated, the wages were fixed at $65 per month, with coal, wood and garden privileges.

Unless there was by the amendment a substantial change in the contract, so as to make the ruling of the Supreme Court inapplicable, it is of course evident that the *res judicata* on the former appeal was as binding on the lower court as if there had been no amendment.

Williams v. Conger, 125 U. S., p. 418.
Clark v. Keith, 106 U. S. 464.
Northern P. R. v. Ellis, 144 U. S. 458.

In the case in 144 U. S. *supra*, the court referred to the decision of the Supreme Court of Wisconsin involved in that case, wherein that court having ruled on demurrer (as here) held *itself* bound by the *res judicata*, on a new appeal, as to all "questions legitimately involved," and said: "this is the settled rule in Wisconsin; Lathrop v. Knapp, 37 Wis. 307; 50 Wis. 552, *and in this court;* Clark v. Keith, 106 U. S. 464; Chaffin v. Taylor, 116 U. S. 567; Peck v. Sanderson, 18 How. 42; Hickman v. Fort Scott, 141 U. S. 415. Under these circumstances the judgment of the Supreme Court is not subject to review here."

Of course, then, the circuit court had no authority to review the judgment of the Supreme Court. It therefore committed no error in overruling the demurrers. It should have disregarded them.

But the appellant will say that, by a statute of Alabama, the Supreme Court may, on a second appeal, change its first ruling, and that the Appellate Court succeeded to this power.

Code of Ala. (1886), § 683a; Code of 1896, § 3840.

This is very true as to the State court, but it is no authority for a *lower* court to review and change the ruling of the *Supreme* Court, and, therefore, the lower court stands as much concluded now by a de-

cision of the Supreme Court as if the statute had never been passed.

The assignment of error (No. 1½) relates to the action of the lower court, and that was, in effect, but a refusal to set aside and reverse the order of this court (for the order of the State Supreme Court stands as the act of this court). Nothing, therefore, can be taken by this assignment.

This court does not take power or authority of any sort under any section of the Code of Alabama. This court, as to the effect of its decisions, is not in the least regulated thereby. The State law can not enlarge, any more than it can restrict, the power of this court or the manner of its procedure.

It is true new rights may be created by statutes which the Federal court will recognize and enforce, but such enforcement is according to its own procedure.

Hollins v. Briarfield, &c., 150 U. S. 371.
Indianapolis, etc., v. Horst, 93 U. S. 291.
1 Foster Fed. Proc., § 6.
Morrow S. M. Co. v. N. E. S. Co., 60 Fed. Rep. 341.

If it was in the power of the State court, on a second appeal, under section 683a of the Code of 1886 to put a new version on the contract construed on the first appeal, in 110 Ala. 533, and the appellant wanted the privilege of the exercise of that power it lost it by removing the cause to the Federal court, where no such rule obtains.

When the case was removed to this jurisdiction, thereby the decision of the State Supreme Court was made the judgment of the Supreme Court of the United States, so far as the law of this case is concerned. After that, no matter how erroneous the decision might appear to be, it is out of the power of even this court to alter it, since the law is that a decree once pronounced in a cause on appeal is the unalterable law of that case.

See the rule and authorities in Northern P. R. v. Ellis, 144 U. S. 458.

On this rule and these principles, this court, it seems, would be obliged to reverse the circuit court had it sustained appellant's demurrer instead of overruling it, without regard to the abstract question of error *vel non*. And for the same reason it must reverse the ruling of the appellate court in sustaining these demurrers.

It is entirely unnecessary, therefore, on this view, to consider the merits of the demurrer to the complaint. Nevertheless we will consider the question independently of the *res judicata* arising from the former judgment.

The only substantial question presented by the demurrer is, whether the contract is one of ordinary hiring, by which the appellant was at liberty to discharge the appellee at its option.

The Supreme Court thought the point was too evident to require extended consideration. But we will not dispose of it so summarily, though of the same opinion.

Look at the situation, as disclosed in the recitals of the contract. Pierce "was *seriously* hurt, under circumstances which I (Pierce) *claim* render the said company liable to me (Pierce) for damages." The seriousness of the hurt may be somewhat gathered from the facts, shown in the contract, that the injury occurred in May, 1888, and work, "*such as I could do*," was resumed in May, 1889. Here is a long interval, perhaps of suffering, and a recognition of *permanent disability*. This being the situation, and the appellant, being anxious to settle this claim, obtains from Pierce the absolute "release (of) the said company from any and all liability for said accident, or from injuries resulting to (him) me from it, or the effects of it, and agree that *this* is to be a *full* and *satisfactory* settlement of any and all claims which I might have against said company."

We see very well what Pierce has given, beyond

recall, viz: a release of what he *then claimed* to be a right to damages.

Now, what does Pierce get for this? Let us take first the appellant's construction. The appellant insists that Pierce went into this formal documentary release of his claim for damages, for his serious and permanent injury, for the consideration of being employed *one month*, at the wages he had been receiving before he was hurt.

Russell v. Allen, 108 N. Y. 288.

Notes to Carnig v. Carr, 35 L. R. A. 517.

The appellee insists that the term of the contract to be performed by the appellant is to be construed *contra proferentem*. That the company is bound to the interpretation which it must have supposed Pierce put upon it, if the words will bear it. And that it cannot be supposed for a moment that he would have given up the supposed valuable right of compensatory damages for the paltry consideration of being employed for one month, or at the will of the appellant, which is the same thing. Nor does the contract bear such interpretation. The first proposition made, and which was accepted, was "that they would furnish me such supplies . . . as I might choose to take; pay me regular wages *while I was disabled*, and give me my coal and wood for fuel and the benefit of the convict garden." The next proposition, which was a mere modification of the first, was to give me such work as I could do, paying therefor the wages paid me before said accident—that is, $60 a month, and, in addition, free house rent, or in lieu . . supplies . . equal to amount paid for house rent." The third and last proposition was a mere substitution of five dollars per month, in wages, for "supplies," the motive and purpose of the lass modification being shown in the recital; "and whereas, . . it is mutually agreed . . that it will be better to give me house rent than the supplies of about equal amount," upon which immedtately follows the final

agreement which says that "My wages *from this date* are to be $65 per month," with coal and wood and the garden privilege. We thus are enabled easily to understand the consideration Pierce was to receive. He was to have "*regular wages*' and certain supplies, "while I (he) was disabled." The next modification was to give him, and to require him to perform, "such work as I (he) could do." There was in this a change of what Pierce was to do, but none in what appellant was to do. It was still to pay "regular wages" while Pierce "was disabled." And the last change was merely to substitute money, to the amount of five dollars, for supplies from the commissary, the "wages *from* this date" being $65 instead of $60; the time *for which* said wages were to be paid being determined by the first contract, viz: during the disability.

This is the only reasonable interpretation which can be put upon the words of the instrument.

It is the only interpretation that Pierce, or a man in his situation, would have accepted.

Carnig v. Car, 35 L. R. A. p. 517.

Russell v. Allenton, 108 N. Y. 288.

Nor is it an interpretation at all hard on the appellant, for the work which Pierce was able to do in his disabled condition was worth, according to the testimony of appellant's own witnesses, all that it agreed to pay him. "Sixty or sixty-five dollars (per month) would be a reasonable value for the work he did in running the compressor."

Record 43.

We have a right to look at this evidence merely to place ourselves in the situation of the parties when the contract was made; to show that appellant knew it would get "in work" as much as it was to pay Pierce, and thus that it would not be unreasonable for it to contract to pay permanent wages for an equal amount of work, if it could get the absolute release thrown in.

It is evident, then, that the Supreme Court of Alabama was entirely correct in ruling on the demurrers as it did, and that this court would adopt its ruling, if the question was not already concluded.

The appellate court committed clear error in ruling to the contrary of this, and in reversing the law of the case as settled on the former appeal.

DEMURRER TO PLEA NO. 2.

This plea is by confession and avoidance. It admits everything alleged in the complaint, but for answer says, and as a full answer, that the plaintiff quit work without excuse and that therefore appellant discharged him absolutely.

It is an elementary rule, "that every pleading must be an answer to the whole of what is adversely alleged."

Stephen on Plead., m. p. 216.
Nesbitt v. McGehee, 26 Ala. 748.

It is likewise just as elementary, that a contract cannot be rescinded in part; and that if the situation is such that there cannot be a rescission *in toto*, so that the parties can be placed *in statu quo*, any breach by one party can only be compensated by damages.

Shields v. Barrows, 17 How. 130.
Snow v. Alley (144 Mass.) 11 N. E. Rep. 764.
Neal v. Reynolds, 16 Pac. 785.
Jones v. Anderson, 82 Ala. 302.
Henry v. Allen, 93 Ala. 200.
Perley v. Balch, 23 Pick. 286.
Coolidge v Bingham, 1 Metc. (Mass.) 547.

The appellant received, as the consideration in part from the appellee, an absolute release from liability from a claim for damages. This was the great inducement to the contract.

Frazier v. E. T., V. & G. R. R. Co., 12 Southwestern Rep. 537.

Snow v. Alley, 11 N. E. 748.
Notes to Carnig v. Carr, 35 L. R. A. 517.

There was no proposition for *restitutio in integrum*, nor was it possible. The appellant, therefore, proposed, by its second plea, to retain the consideration, and repudiate the contract as to the other party.

The case of Snow v. Alley, *supra*, citing many authorities, is a complete answer to this proposition, holding that compensation for damages where restitution is impossible must be sought in some other manner than by a repudiation of the contract.

There was no error, therefore, in the circuit court sustaining the plaintiff's demurrer to the second plea; and for the same reason the appellate court erred in reversing the ruling of the circuit court.

ASSIGNMENT OF ERROR NO. 2, RECORD 51.

The contract sued on is signed by G. B. McCormack, but in its face it purports to be the act of the defendant. The assignment of error is, that this contract was allowed to be introduced in evidence as that of the defendant. The signature of McCormack was admitted as genuine. Before the contract was admitted the plaintiff proved that McCormack was superintendent and manager for defendant, and that he had made for the defendant the several agreements mentioned in the contract, and that he (plaintiff) had worked and been paid under the contract and according to its terms, from 1888 to May 4, 1891, and that he had been discharged by McCormack, and that he had written to McCormack the letter of the 8th of May and received the reply of the 12th shown on page 39-40 of the record, and that the predecessor of McCormack as superintendent hired him originally, that Rogers, an officer of the company, paid the plaintiff under the contract. Record 33-4.

This was sufficient to show that McCormack acted with authority previously given or subsequently ratified.

The appellate court made no ruling on this assignment.

ASSIGNMENT NO. 3, RECORD 51.

This assignment is an objection to evidence showing the character and extent of the injuries received by the plaintiff.—Record 34. This matter was directly involved, since the plaintiff's right depended on the permanency of the disability, which was therefore proper to be proved.

ASSIGNMENTS NO. 4, 5, 13 AND 14, RECORD 51-2.

These assignments relate to attempts to vary a written contract by proof of antecedent matters merged therein.

1 Greenl. on Ev., § 275.

ASSIGNMENT NO. 6, RECORD 51.

This assignment raises the objection that plaintiff could not prove that defendant's superintendent wrote the contract.

The rule is expressed in Noonan v. Bradley, 9 Wall. p. 407, that "one who takes an agreement prepared by another * * should have a construction given to the instrument favorable to him." The proof had to be made to obtain the benefit of this general rule of construction.

ASSIGNMENTS NO. 7, 8, 9, RECORD 51-2.

These assignments cover objections to evidence of the character and behavior of the convict Dunn with whom plaintiff was required to work.—Record 37-8. The evidence was entirely proper when it was introduced and for the purpose of meeting the plea, No. 4, of recoupment for loss of plaintiff's services,

but became harmless from the view taken by the court of the case, by which plaintiff was limited in recovery to the installments past due at the trial. This evidence did not increase the installments, nor affect the rejection of the plaintiff's unconditional tender of performance by his letter of the 8th of May.—Record 39. As plaintiff worked up to May 4th, and he unconditionally tendered service on the 8th, the plea of recoupment was without effect, except possibly for the loss of service for four days, as to which counsel for defendant, on the trial below having disclaimed any purpose to claim, will hardly make claim now. But if he should, this evidence was pertinent as showing good reasons for not working for those four days with a dangerous "wild animal" in the keeping of defendant.

ASSIGNMENTS 10 AND 11, RECORD, 52.

These assignments are objections to the introduction as evidence of plaintiff's letter of the 8th of May and the reply of the 12th.—Record, 39, 40.

The circumstances shown in these letters were part of the *res gestæ* and necessary and proper to be shown if they had transpired *ore tenus*, and certainly no force is lost by their having assumed the more desirable form of writings. The plaintiff had to show a discharge, he also desired to show a tender of performance, both of which the letters showed.

TWELFTH ASSIGNMENT. RECORD, 52.

On cross-examination of defendant's expert, plaintiff asked the question shown in this assignment, to elicit the fact that the witness had made a mistake in one instance, and thus was not proof against mistakes in other instances. It reflected light upon the quality and capacity of the witness, and was therefore proper.

Marler v. State, 68 Ala. 580.

The evidence, moreover, was entirely harmless; it did not increase the amounts due under the contract.

FIFTEENTH AND SIXTEENTH ASSIGNMENTS. R. 53.

The plaintiff proved, by an admitted expert, that the sums past due under the contract to the trial, the evidence being undisputed that no payment was made after April 1st, 1891, and that the payments were $70 per month, amounted with interest to $5,893.00. And the court charged the jury that on the evidence in the case the plaintiff was entitled to recover, and that the measure of damage was the aggregate of the installments past due with interest, and that the amount was $5,893.00. Record, 46.

On the objection to the witness stating the result of the mathematical calculation of the sum of the amounts, of $70 per month, from 1st May, 1891, to trial of this case, in January, 1897, with interest, it is to be observed, that the calculation is a long and an intricate one, much beyond the capacity of the average juror, not one in a hundred of whom could solve the problem. It falls, therefore, directly within the rule laid down in the note to Carter v. Bohem, 1 Smith's Lea. Cases, 286, where it is said: "It appears to be admitted that the opinion of witnesses possessing peculiar skill is admissible whenever the subject-matter of enquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without assistance; in other words, when it so far partakes of the nature of a science, as to require a course of previous habit, or study, in order to the attainment of a knowledge of it."

Any one fairly acquainted with mathematics can calculate the present value of an annuity, at any given per cent. and number of payments per annum,

yet it is the constant habit to rely on experts and tables of calculations.

Vicksburg v. Putnam, 118 U. S. p. 534.

Rogers on Expert Testimony, § 160.

On the undisputed evidence the plaintiff was entitled to recover. The contract had been construed so as to give the plaintiff, for life, the right to the payments of $70 per month, if his disability was permanent. The undisputed evidence showed that such was the fact. The plaintiff was a machinist. By the accident one hand was "crushed," one finger torn off," and the hand left weak and so that it could only be half closed and could grasp nothing; one leg was 2½ inches shorter than the other, the bones had been taken out, the ankle crushed or dislocated, so that it could not be bent and was painful to stand upon. The hand and ankle and leg were shown, so that the court could see that the disability was permanent. The plaintiff's occupation of a machinist was gone.

Frazier v. E. T., V. & Ga. R. R., 12 Sou. West 537.

Young v. Travelers Ins. Co., 13 Atlantic, 896.

Walcott v. Mitchell L. & A. Ins. Co., 8 N. Y. Sup. 263.

Hutchinson v. S. T. K. of K., 22 N. Y. Sup. 801.

In the case in 13 Atlantic, *supra*, which was a suit on an accident insurance policy, the insured was a billiard-saloon keeper, and the insurance policy gave him certain indemnity, "if the insured shall sustain bodily injuries * which shall * * *wholly* disable and prevent him from the prosecution of any and every kind of business pertaining to the occupation, &c." and the indemnity was to last, "for such period of *continuous total disability*." The plaintiff admitted that he could do some acts necessary to be done in the business, but claimed that he was wholly disabled from doing many of the mate-

rial acts necessary to be done in the business. The court instructed the jury, that if he was so disabled as that from the disability he could not do every act pertaining to his occupation, he was entitled to recover. This instruction was approved, and the court illustrated its propriety by the case of a barber losing his right hand, and asks, "can it be said that he is not wholly disabled from the prosecution of his business *as a barber?*"

Here, there was practically the loss of one hand and one leg; and the court knows judicially that this is a disability for the prosecution of the calling of a machinist, and that it is permanent.

There was then no answer to the complaint on the first plea. The second plea was eliminated by the demurrer thereto. The third plea was met by uncontradicted evidence of the authority of McCormack, by ratification, if not otherwise, to make the contract. So that the sole question was, whether plea four had been made out, and to what extent. This was a claim of recoupment for loss of plaintiff's work. But the undisputed evidence showed that plaintiff worked up to the 4th day of May; that he made an unconditional tender of further service on the 8th, and that this was unconditionally refused by the defendant.

Record, 33-4-5-6-39-40.

So that plea 4 rests entirely on the possible loss of service for four days, and as to that there was no proof of its value, and, besides, it is shown that there was no *demand* for that service and no refusal to render it.—Record, 34. And beyond this the defendant in the trial below expressly disclaimed any claim for the mere service of four days, and will doubtless do the same here, by not making the point.

The case, then, stood thus before the lower court. The plaintiff showed and proved a liability on a written contract, by the defendant, to pay him $65 in money and $5 worth of supplies, total $70 in

money, per month, from and including the month of April, 1891 to the month of January, 1897; and showed the default in these payments; and the court seeing and appreciating the difficulty of making the calculation to be made, accepted the uncontradicted evidence of an admitted expert as to the result of the problem, and directed the jury to find the amount. The only mistake the court made was that it restricted the recovery to the amounts due up to the trial. It had a perfect right and it was its duty to instruct as it did for the plaintiff.

The case stood precisely as if the defendant had made default, since none of its pleas were in the least sustained, and the complaint was fully made out by uncontradicted evidence. And thus the court had the right to direct the verdict.

North P. R. Co. v. Com. N. Bank, 123 U. S. 727.

Union P. R. v. McDonald, 152 U. S. 262.

Robertson v. Edelhoff, 132 U. S. 624–626.

Deleware, &c., R. v. Converse, 139 U. S. 469–472.

"It would be an idle proceeding to submit the evidence to the jury when they could justly find only in one way."—*Ib.*

ASSIGNMENTS OF ERROR 17 TO AND INCLUSIVE OF 27, RECORD 53-4-5.

It is entirely unnecessary to consider these assignments.

If the plaintiff was entitled to recover, as the jury was instructed he was, the several charges asked by defendant were necessarily wrong. But even if the court was wrong in that instruction, the charges were still all obviously wrong and properly refused.

Charge 1 (17th assignment) assumed a fact not proved, and an immaterial fact, since the jury was not required to find the fact whether plaintiff left defendant's service wrongfully, unless it be on the

question of the value of four days service, of which there was no evidence or claim for, since there was an unconditional tender of service after four days, which was rejected.

Charge 3 (19th assignment) asserts that a contract may be rescinded without a *restitutio integrum*, and, in this case, that defendant may hold the main consideration and refuse full performance and rescind *in toto* as to performance on its part.

Charge 4 (20th assignment) asserts in effect that a machinist is not disabled, by the loss of legs and arms, if he can "work" his tongue.

Charge 5 (21st assignment) asserts the same proposition.

Charge 6 (22d assignment). The evidence was undisputed that plaintiff worked till the 4th of May, and that on the 8th there was an unconditional tender of service; the hiatus is four days; there was no evidence of the value of the work of those four days; and besides, this charge *assumes* that the defendant having lost the service of plaintiff for one day, without its own fault, is entitled to the value of such service for the *whole term* of the contract (i. e., for Pierce's *whole life*), though the next day plaintiff tendered full performance, and though plaintiff was only allowed to recover on the contract damages to the day of trial.

Charge 7 (23d assignment) *assumes* that defendant lost plaintiff's service without its fault, and gives defendant the value of that service, by recoupment, for plaintiff's life, notwithstanding the unconditional tender of service by plaintiff in four days, and while plaintiff was not allowed to recover damages *beyond the trial*.

Charge 8 (24th assignment) left the construction of the written contract to the jury. Under that charge the defendant had a right to ask the jury to consider what "disabled" meant "in the contemplation of the contract," and to insist that they

might find that there was no "disability," though the use of both hands, instead of one, was lost.

Charge 9 (25th assignment) raises an immaterial issue. Whether the excuse referred to was good or bad would only affect the question of damage for four days absence, at most, about the value of which there is no evidence, nor is there any claim for this damage.

Charge 10 (26th assignment) raises the same immaterial issue. The question is not, whether the defendant has done wrong in discharging plaintiff, but whether it has done wrong in not paying him. If Pierce had fraudulently intended to do no work when he entered into the contract, and had never tendered his work on the 8th of May, 1891, and had not worked to May 4th, still the defendant could only deduct its damages from the loss of service.

Snow v. Alley, 11 N. E. (144 Mass.) *supra*.

Charge 11 (27th assignment) raises an immaterial issue. The defendant, it seems, should have enquired why plaintiff said he could not work with Dunn, but it made no enquiry, but discharged plaintiff instantly, because he would not risk his life with a drinking, murderous convict in the keeping of defendant.

Record 36.

But this charge, like a number of the others, can have no bearing except as to the loss of service between the 8th and 12th of May, since on the latter day there was an unconditional tender of service and a like unconditional refusal. This is equivalent to performance.

Hepburn v. Auld, 1 Cranch 321.

Frazier v. E. T., V. & G. R. R., 12 S. W. 537.

And as to the service for those four days, it is very clear the plaintiff was not at fault. He was not called upon to do any work.

Record 36.

12 S. W. *supra*, p. 539.

But if he was wholly at fault, there is no proof of the value of the work for these four days, nor any claim therefor; and if there was, and if the proof was made out, it might be said *de minimis non curat lex.*

On the whole, then, there should be a reversal on Pierce's appeal and an affirmance on that of defendant below.

Reply to the Arguments Made in the Appellate Court on Appeal of Tenn. C., I. & R. R. Co.

The counsel for defendant below, in his argument in the Appellate court, besides urging some law points which we think are unsound, refers to some matters *dehors* the record, and again does not state some matters of record quite fully.

For instance, he says the plaintiff below requested the court to give the charge which is the subject of his 16th assignment of error (Record 53), and he insists that thereby the plaintiff waived the exception to the exclusion of testimony relating to the right to recover damages beyond the trial as shown in the first error as assigned by Pierce.—See brief of Mr. Percy. If we refer to the record, pages 46 and 61-2, we will see the *exact* facts upon which he seeks to estop the plaintiff from urging the error referred to. It is said, on page 46, that:

"At the conclusion of the evidence the court stated that it would limit the recovery to the installments of pay due at the commencement of the suit, but, after argument, said that plaintiff should be entitled to installments due up to the trial, and asked defendant's attorney if that was his view of the law, viz: That if the plaintiff was otherwise entitled, whether he should recover for amounts due to the trial, to which defendant's attorney told the court that such was the law, and thereupon the court said it would so rule, and asked plaintiff's attorney to prepare such a charge to the jury, whereupon plaintiff's attorney prepared and handed to

the court this written charge," viz; the one referred to by counsel.

If we further refer to pages 61-2 of the record, we will see that on motion of defendant's attorney, the court excluded all evidence relating to the right to recover damages beyond the day of trial. To which the plaintiff excepted. And, now, this same counsel argues gravely to the court that plaintiff waived the right to assign this error, because he insisted that he was at least entitled to recover up to the trial!

We think the court can very well see that plaintiff in no wise waived his right to full damages, by *allowing* the circuit court to have its own way!

Again counsel says:

"That the Supreme Court of Alabama in its opinion, as originally delivered, held that defendant in error could recover damages during his expectancy of life and beyond the time of the trial, deducting whatever benefit the evidence showed the plaintiff in error was deprived of by the loss of defendant in error's services during the same period. As this was palpably in conflict with the Alabama decisions, limitating the recovery to damages suffered up to the time of the trial, the Supreme Court of Alabama, in response to an application for a rehearing, withdrew that portion of their opinion which related to the question of damages, it being unnecessary to the decision of the case, as it was then presented on the pleadings only."

And the counsel further says: "The charge requested by plaintiff in error, numbered seven (assignment of error 23, Record p. 54), was based on this opinion of the Supreme Court of Alabama, that the benefit which the plaintiff in error was deprived of by the loss of defendant in error's services under the contract, was a proper deduction. Our opinion is that the Supreme Court of Alabama erred in both of its propositions on this inquiry.

This being a contract of employment, the general rule as to the measure of damages for the breach of such contract applies.

That rule is that in an action which treats the contract as continuing and goes for damages for the breach of it in solido, the measure of damage is the loss suffered by the servant up to the time of the trial, deducting therefrom whatever wages he did or could by the exercise of reasonable diligence have earned in the interim in a similar character of employment."

Now, a good many observations may be made upon these statements of counsel. The first of which is, that whatever doubt there may be of our loss in the suppression of that portion of the opinion of the Supreme Court of Alabama referred to by counsel, there is no question that he has given us in his conclusion matter of equal value!

There is nothing like common sense in testing the soundness of views and the value of precedents. Let us bestow a little of it on this announcement of counsel.

First, the supposition is that "the action treats the contract as continuing," and, yet, "goes for damages for the breach it *in solido*." Is not this rather hard to understand? If the last means, or was intended to mean "for a total breach," or "for a total renunciation by the defendant," then it is in conflict with the first, which provides, that the contract is treated "as continuing." An action for a total breach, or for damages *in solido* (*i. e.* single damages) for a total breach, is founded upon the idea that the contract no longer continues, but is at an end, and that a right to damages has taken its place.

Schell v. Plumb, 55 N. Y. 592.

And if the last part of the announcement does not mean what we have supposed, then it has no clear meaning, and has no application to this case,

which is one for damages for a total breach and renunciation of the contract.

To make the announcement of the law, as made by counsel intelligible, we must leave off one of its categories. And as this is a suit for a total breach and renunciation of a contract, we will test counsel's rule of damages for such a total breach.

Suppose Pierce's claim for damages was worth ten thousand dollars, it might be more, it might be less, correct rules of calculation will fit any amounts. Now, to obtain a release of this claim, the defendant says to Pierce: "If you will release this claim absolutely and perform such work as you can do in your disabled condition, and which may be required of you, we will pay you for life seventy dollars per month." That proposition is accepted. The defendant obtains the release, employs and pays Pierce one month and then discharges him. Pierce sues "for damages for the breach of the contract *in solido*," and the trial comes up the next day after the suit is brought, and counsel asserts that the measure of damage is the loss suffered by the *servant* up to the time of the trial, *i. e.*, the wages due between the discharge and the trial *i. e.* nothing!

Now, keeping in mind that the object of damages is to give compensation for the loss sustained by the abandonment of the contract, is it not plain that the rule laid down, so confidently by counsel, applied to the case supposed, would result in a palpable injustice? Common sense says, and the Supreme Court of the United States affirm, as do all authorities, that the damage for the breach of a contract is the present value of the amount that would have been received under the contract if it had been kept. If the consideration has been received and enjoyed by one party, the other party is entitled to receive as damages for the breach of the contract as to him, the value of the consideration agreed to be paid to him, that is to say, the

present value of the money or other thing agreed to be paid. If there are any mitigating circumstances, as that the plaintiff has in the case of a simple suit for a discharge from service had, or might have had other employment, these, of course, may be shown by the defendant in reduction of the damages.

The next observation to be made is, that counsel is mistaken in assuming that this contract is one of employment, pure and simple, to which may be applied his imaginary rule for damages in such cases.

It is true that a *part* of the contract is one of employment by the defendant. It was entitled to plaintiff's services, *such as he could do*, as part of the consideration for the $70 per month agreed to be paid to the plaintiff. But the plaintiff also released to the defendant his claim for damages—this the defendant received and cannot restore, and is the main consideration. In consideration of *this* and *the service*, the defendant sold an annuity of $70 per month to plaintiff, and then renounced the contract *in toto*. The defendant held to the release, refused the service, and its counsel says, if plaintiff refused to perform a single day's service the defendant is liable for no damages.

Is the law so different from the common view as to tolerate such an idea?

Snow v. Alley (144 Mass.) 11 N. E. 764.

The next observation is on the arraignment of the Supreme Court of Alabama for holding that on this contract there was a right to recover damages for life (that is beyond the day of trial), if the disability was permanent. The learned counsel says the Supreme Court took this back, because it "was palpably in conflict with the Alabama decisions."

We must demur to this on several grounds; first, that we are without record evidence as to what the Supreme Court took back; second, that we are in the dark as to why they suppressed a portion of

their opinion; third, that there is no decision of the Alabama Supreme Court holding that in the case of a total breach of a contract such as this and a suit for damages "*in solido*" (*i. e.*, for single and compensatory damages), a recovery can not be had for the expectancy of life; fourth, that the Supreme Court expressly holds, *in the opinion as it stands*, that the obligation to pay *is for life*, if the disability is permanent, and that "contracts for the support or hire of one during his life are binding, and breaches thereof actionable, see Trustees of Howard College v. Turner, 71 Ala. 429, 434, *and cases cited*."

By referring to the case, in 71 Ala. *supra*, we see from what the court says, that the plaintiff was here authorized to treat the defendant's refusal to pay and its discharge, "as a *total breach*, for which *full* and *final* damages could be recovered." *The cases cited are*, Shell v. Plumb, 55 N. Y. 592; Fales v. Hemenway, 64 Me. 373. *These cases* (thus approved) assert the proposition that only *one suit* for damages for the total breach of a contract to support one for life can be maintained, and that *full* damages for the *whole period* can be recovered!! It would be a contradiction for the Supreme Court of Alabama to say, that only *one* suit can be brought, that *full* damages may be recovered for the value of the contract to pay or furnish for life, but that no damages beyond installments due at the trial can be recovered. The Alabama court is far superior to any such conclusion.

The Alabama court adheres to the simple rule laid down by Mr. Parsons in his work on contracts. He says that where there is a total breach and renunciation of the contract, before the whole time expires, an action may be brought at once in which full and final damage for the whole period may be recovered.

3 Parsons on Con., ed. 1866, p. 189.

Remelee v. Hall, 31 Vt. 582.

Schell v. Plumb, 55 N. Y. 592.
Cooke v. Cook, 110 Ala. 567.
Pierce v. Ten. C., I. & R. Co., 110 Ala. 533.
1 Suth. on Dam., 175 *et seq*.

And, in estimating the damage, the Supreme Court of Alabama could hardly have asserted, as no court could hold, that the defendant could recoup for the loss of services which it rejected or never called for.

Frazier v. E. T., V. & G. R. R., 12 S. W. 537.

The facts of this case seem to justify the inference that the defendant below set a trap for Pierce and got caught in it. It induced him to enter into a contract prepared by itself, in which Pierce released the company absolutely, but which the company did not even sign. Record 37. And which it finally signed in the name of an employe. It supposed Pierce was irrevocably bound, and that it had an option to discharge him the next day. That is the contention now. And the facts show that it eagerly availed itself of the first opportunity to set him adrift. It would not be doing injustice to suppose that the company induced Dunn *its wild beast*, to frighten Pierce into declining to work with him, for it made no parley about the matter, no enquiry, but unconditionally discharged him because he said, "I can't work with Dunn."

Record 36.

Finally, we think we are justified in saying that the defendant employed language in the contract to deceive, it adopted a form of contract to deceive, it resorted to ruses to discharge plaintiff and avoid its contract, it rejected his unconditional tender of service, it pleads under oath *non est factum* to its contract, swears that no Alabama jury will do it justice, and after the law of the contract is unutterably settled, asks this court to disregard the *res adjudicata* of the case and adopt as a rule of law; that the measure of damage, for the total renunciation of a

contract to pay an annuity, of *any amount*, for *any number of years* or *lives*, is, at most, the installments due at the time of the trial, which may be nothing, or a large amount, according to the dispatch of justice.

This is the contention of counsel as will be seen when it is analyzed.

The fact that there was to be a *concurrent* rendition of service by the purchaser of the annuity could only affect the damage, by the value of that service, if not rendered, and could not affect it at all if rejected. And as it was rejected here, the contention of counsel is, that the present value of the annuity of $70 per month for Pierce's life, is at most the installments which happen to be due at the trialof the suit for damages "*in solido*" for the breach and renunciation of the contract.

In conclusion, we think that the plaintiff's case standing entirely unanswered and being for a money demand the court should reverse and render judgment for the full value of the annuity.

W. A. Gunby

for F. H. Pierce

No. 469. 174.

Brief of Grubb for Respondent

Filed Oct. 11, 1897.

OCT 11 1897
JAMES H. McKENNEY

469

In United States Supreme Court.

OCTOBER TERM, 1897.

EX PARTE FRANK H. PIERCE.

BRIEF AND ARGUMENT OF COUNSEL FOR

TENNESSEE COAL, IRON & RAILROAD COMPANY.

In United States Supreme Court.

OCTOBER TERM, 1897.

EX PARTE FRANK H. PIERCE.

BRIEF AND ARGUMENT OF COUNSEL FOR

TENNESSEE COAL, IRON & RAILROAD COMPANY.

Petitioner's application for a writ of certiorari is based on two grounds. (Petitioner's brief page 2.) They are: 1. Incompleteness of the transcript of the record of the proceedings in the State Court from which the case was removed. 2. The refusal of the Circuit Court of Appeals for the Fifth Circuit to respect and observe the res judicata of the case established by the decision of the Alabama Supreme Court.

I.

The defect in the transcript from the State Court of which petitioner complains, is the omission from the transcript of the proceedings in the Supreme Court of Alabama.

Petitioner's exact contention is that the Circuit Court and the Circuit Court of Appeals should not have retained jurisdiction of the cause "in the absence of a full record from the State Court, by the fault of the party removing the cause." This being a removal on the ground of local prejudice, there was no requirement imposed by law on defendant to bring into the Federal Court a copy of the record, (Dillon on Removal of Causes, Sec. 52.) Hence if the record was imperfect, it was no fault of defendant's. The record is brought into the Federal Court by a certiorari to the State Court in cases removed on this ground. We submit that the record fails to show that the alleged defect in the transcript from the State Court was ever called to the attention of either the Circuit Court or the Circuit Court of Appeals. It is true that the record (Pages 21-22) does show that a motion to remand the case to the State Court was denied by the Circuit Court. The grounds of this motion, however, do not appear in the record. As a matter of fact, the only grounds relied on in that motion were that the showing of local prejudice was insufficient and that the application came too late. This Court will not presume that the alleged imperfection of the transcript was one of the grounds. The proper remedy to cure such an imperfection in the transcript was by a certiorari to the State Court, after suggestion of diminution of the record, and not by motion to remand the case to the State Court. (Dennis vs Alachua Co., 3 Woods 683-Cook vs Whitney, 3 Woods 715.) No such application was made either in the Circuit Court or the Circuit Court of Appeals, and the record fails to show that any complaint was ever made of this alleged imperfection in the record until the present application was made to this Court. The petitioner sued out a writ of error from the Circuit Court of Appeals. (Record page 64.) In his Assignments of Error, there appears no assignment based on the denial by the Circuit Court of his motion to remand the case to the State Court. (Record pages 65-66.) Whatever may have been

the ground relied on in that motion—whether it was that the showing of local prejudice was insufficient, or that the application to remove came too late after a trial on demurrer, or that the transcript of the State Court was incomplete—and however well founded any one or all of these grounds may have been—the petitioner having voluntarily omitted to ask the Circuit Court of Appeals to review the action of the Circuit Court in denying his motion, by an assignment of error in that Court, cannot in this Court be heard to complain of a ruling which he chose to acquiesce in on his appeal to the Circuit Court of Appeals. He had an ample remedy to correct any error of the Circuit Court on this motion to remand, on his appeal to the Circuit Court of Appeals, by assigning it as error. His voluntary failure to do so, does not entitle him to the extraordinary remedy of the writ of certiorari. For mere incompleteness or defect in the transcript, if such existed, his remedy was to apply to the Circuit Court, after suggesting deminution of the record, for a certiorari to the State Court. This should have been done before trial in the Circuit Court. (Commercial Savings Bank vs. Corbett, 5 Sawy. 172, Dennis vs. Alachua Co., 3 Woods 683, Cook vs. Whitney, 3 Woods 715.) Petitioner elected to go to trial in the Circuit Court without objection to the condition of the record, and to submit the case on appeal to the Circuit Court of Appeals without making any such objections. His first objection is made to this Court in this application for a writ of certiorari to the Circuit Court of Appeals. The granting of this application, and the issuance of a writ of certiorari to the Circuit Court of Appeals, it is very clear could not correct the alleged imperfection in the transcript of the proceedings of the State Court. The Circuit Court of Appeals, in response to the certiorari, could only send up the record in the cause, as it appears in that Court, that is, in its alleged imperfect condition. It could not supply what is alleged to have been omitted from the transcript from the State Court. The State Court alone could supply the matter

alleged to have been omitted from that transcript. Consequently the certiorari for that purpose should be directed to the State Court—not to the Circuit Court of Appeals—and should be issued out of the Circuit Court and not this Court. We do not think that counsel for petitioner seriously contend that an imperfection in the transcript of the proceedings of the State Court, takes away the jurisdiction of the Federal Court to try the case, if jurisdiction otherwise existed. That the Federal Court did acquire jurisdiction appears from the proceedings for removal. (Record pages 5-10.) The petition for removal shows the jurisdictional facts. If the petition for removal was filed too late, that was an objection that could be waived by petitioner. (Gerling vs. B. & O. R. R. Co., 151 U. S., 673; Newman vs. Schwerin, 61 Fed. Rep., 865.) It was waived by the failure to prosecute on appeal, the motion to remand made in the lower Court. (Tod vs. Cleveland & M. V. R. R. Co., 65 Fed. Rep., 145; 12 C. C. A, 521.) Even if the Circuit Court had erred on a jurisdictional question, the remedy provided for reviewing such error by the Act of Congress creating the Circuit Court of Appeals, is by appeal to the Circuit Court of Appeals, or directly to the Supreme Court, not by certiorari. While the Act of Congress confers unlimited authority on this Court to remove by certiorari from the Circuit Court of Appeals all cases there pending in which a final judgment has been or may be rendered, this Court has imposed definite restrictions on the exercise of this right, and has granted the writ only in cases of public gravity or importance, or where there is a difference of opinion between the different Circuit Courts of Appeal on similar questions, or where there is a difference of opinion, which will result in a conflict of jurisdiction between a Circuit Court of Appeals and a State Court of last resort. We submit that the first ground on which the present application is made, viz:—that the Circuit Court of Appeals retained the case in its jurisdiction, the transcript of the proceedings in the State Court being incom-

plete, finds no semblance of support from any of the grounds for granting the writ laid down by this Court. The purpose of the writ of certiorari provided by the Act creating the Circuit Court of Appeals, is to have the case certified to this Court for review on the record, as it appears in the Circuit Court of Appeals. Petitioner however seeks to pervert its purpose to that of a mere remedial writ for the perfecting of an imperfect record—a writ of certiorari to correct a diminution in the record. We further submit that the transcript from the State Court, is not, in fact, incomplete. The Clerk of the Circuit Court of Jefferson County could not in the nature of things certify as part of the record of his Court, proceedings that were had in the Supreme Court of Alabama. It is not charged that he omitted from his transcript any of the proceedings had in his own Court. However incomplete the record of such proceedings may be, the petitioner, after electing to go to trial without objection on that ground, both in the Circuit Court and the Circuit Court of Appeals, cannot now be heard to question its sufficiency.

II.

It is contended that the writ of certiorari should issue because the Circuit Court of Appeals refused "to respect and observe the res judicata of the case established by the decision of the State Supreme Court." We understand that, by this, counsel for petitioner mean to rely for ground of certiorari on the existence of a conflict between a Court of Appeals and the Courts of a State. This Court has never held that a decision of a Circuit Court of Appeals involving merely a question of res adjudicata, whether that res adjudicata is based on the decision of a State Court or not, is any ground for the granting of the writ applied for. It has held that where a Circuit Court of Appeals decides a question differently from a State Court of last resort, and where that decision will or may result in a conflict of

authority between the Federal and State Courts, there exists a proper case for the granting of the writ, and this though no question of res adjudicata arises. The decisions in conflict may have been rendered in cases between different parties, yet if the enforcement of the Federal decision is likely to lead to a conflict of authority, this Court will grant the writ, though no question of res adjudicata could arise. So we submit that a mere question of res adjudicata arising on a former decision of a State Court, where no danger of conflict between jurisdictions is to be apprehended as a result of such decision, furnishes no ground for the granting of the writ of certiorari under the qualifications laid down by this Court. The vital and determining fact is not the mere difference of opinion between Courts, but that as a result of such difference of opinion, conflict between jurisdictions may arise. Mere difference of opinion between State and Federal Courts is harmless. On questions of general commercial law, the Federal Courts reserve to themselves the right to determine differently from the State Courts, and only respect state decisions for what they are logically worth. Surely it will not be contended that on such questions and where there can be no apprehension of a conflict of jurisdiction arising out of the enforcement of the Federal decision, a mere difference of opinion between State and Federal Courts will justify the issue of the writ. The result of such an unqualified rule would be that the writ would issue to review a decision of a Circuit Court of Appeals on a question of commercial law, which followed a previous decision of this Court on the same question, but antagonized that of a State Court of last resort. In the case of Forsyth vs. City of Hammond, 166 U. S., cited by counsel for petitioner, the rule and its qualifications are manifest. The question there involved was one of purely local law—the construction of a State Statute and Constitution. The opinion of the State Court of last resort would be followed by this Court on such a question, as binding. The result of a different decision by the Federal

Court from the State Court of last resort in that case, when its enforcement was attempted, would have been to put the Federal authorities in imminent conflict with the State authorities. This apprehended and unseemly conflict of jurisdictions, together with the local character of the question in controversy, justified the issuance of the writ. The distinction between that case and the case at bar is obvious. The question involved in this case is the construction of a mere private contract—a question of general commercial law—without public interest—not dependent on the construction of any State statute or constitution—the decision of which would violate no established rule of property and the enforcement of which could not possibly cause a conflict of jurisdiction. In the case of Forsyth vs. City of Hammond, supra, the State Courts were still insisting on the validity of their decision that the territory in controversy had been legally annexed to and was a part of the City of Hammond, and it was the attempt of the municipal authorities of the City of Hammond to tax such property that led to the injunction proceedings in the Federal Courts. The prosecution of such injunction proceedings had an inevitable tendency to array the State and Federal authorities in conflict. No such result would follow from the decision of the Circuit Court of Appeals in the case at bar. From it no possible conflict of jurisdiction can arise. The State Courts upon removal of the case parted with all jurisdiction of it. No process from any State Court can issue that will conflict with process issued from the Federal Courts to enforce its judgment. The question decided has no significance beyond the particular case at bar. It is obvious that there is no possible chance of any conflict of authority or jurisdiction to be apprehended from the enforcement of the judgment of the Federal Court in this case. Not more so than if the case had originally been instituted in the Federal Court. Unless this Court is prepared to hold that the existence of mere difference of opinion upon a question which the Federal Courts reserve the right to determine

independently of the State Courts, where there is no danger of conflict to be apprehended from the enforcement of such decision, affords ground for the issuance of the writ of certiorari, we submit that the petition fails to make out a case, conceding that such difference of opinion exists.

An examination of the record will show, however, that the Supreme Court of Alabama, does not differ in its construction of the contract sued on from the Circuit Court of Appeals, because the Supreme Court of Alabama never construed the contract, which the Court of Appeals had presented to it. The case was appealed to the Supreme Court of Alabama from a ruling of the lower court on demurrer to the complaint. The written contract was set out in the complaint but set out incorrectly. The Supreme Court of Alabama only construed the contract as it was incorrectly copied in the complaint. The petitioner after the case was removed to the Federal Court corrected the written contract by amending his complaint. The amendment appears in the record (pages 25-26). The contract, as it appeared before amendment, in the record (pages 13-14). Petitioner contends that the amendment did not change the legal effect of the written contract, because the omitted portion, inserted by amendment into the contract, was in a recital of a former parol contract on the same subject matter between the same parties, and not in the "contracting" part of the written contract. The contract sued on was a contract of hiring, and its duration was the doubtful point upon which construction was sought. Petitioner contended that it was to last during disability and not from month to month. Two former contracts between the same parties on the same subject matter had been entered into, and their terms were recited in the written contract sued on. The first of these contracts by its express terms was to last while petitioner was disabled. The second and the written contract sued on made no mention of the duration of the term of employment. The contention of petitioner was that a proper construction of the written

contract showed that it was a mere modification of the first verbal contract recited in it, and that for this reason the period of duration in the first agreement should be imported into the third, or written contract, by implication, making it one to last during the disability of petitioner. The defendant on the other hand contended that the third contract was an independent, separate contract from the first, but conceded that the third or written contract was a mere modification of the second. On this question of construction, was the omission of the clause, inserted into the contract sued by amendment, material? It is clear that it was. Before the amendment, by the terms of the second contract, the petitioner was entitled to $60.00 a month and free house rent. He had no option to insist on commissary supplies in lieu of house rent—had no right to supplies at all. The third or written contract —that sued upon—recites that the parties agreed that it would be better for petitioner to have house rent than supplies of equal amount, and modified the previous agreement by taking away his option to demand supplies instead of house rent. As before the amendment was made, petitioner's only right to supplies, as appeared from contract then sued on, was found in the first contract recited, it was necessary to refer back from the third contract to the first, in order to account for the obligation in the third on the part of defendant to allow petitioner supplies from its commissary. Under this incorrect statement of the contract, the Supreme Court of Alabama may have been right in construing the contract to be one for the disability of petitioner, on the theory that the third and written contract—the one sued on—was necessarily a mere modification of the first, because its terms were unintelligible unless referred back to the first. The amendment made by the petitioner after the removal of the case, did away with any necessity for looking back to the first contract recited in order to make the written contract sued on intelligible. As we have stated the second contract before amendment provided

that petitioner should be allowed only house rent and $60.00 a month wages—it provided for no supplies in lieu of house rent. The amendment was as follows: "or in lieu of house rent, a certain amount of supplies from the convict commissary at No. 2 prison, which supplies were to amount to about the sum paid me for house rent." These words were inserted by the amendment in the written contract sued on, immediately after the words "$60.00 a month and in addition free house rent," appearing in the recitals of the terms of the second contract. The amendment made it apparent that the reference in the third and written contract—that sued upon—to "supplies of about equal amonnt from the commissary" was to the second contract, of which defendant conceded the written contract was a modification —and not to the first contract, of which defendant denied the written contract sued on was in anywise a modification. The proper construction of the contract sued on is not a matter for the consideration of this Court on this application. The issue now is, was the clause inserted in the written contract—that sued on—by amendment, after the case had been reversed by the Supreme Court of Alabama, material in its construction. That it has a material bearing in determining whether the written contract is a separate, independent contract from the one first recited in it, is evident, and this was the vital question considered by the Court in determining whether the written contract was for any certain duration, since it was conceded that no duration was expressly mentioned in it, except as such duration could be arrived at by looking to the first contract, recited therein. We submit that, as a matter of fact, the Supreme Court of Alabama has never decided what the proper construction of the corrected contract was, since that contract was never submitted to it. There can therefore be no conflict of opinion between that Court and the Circuit Court of Appeals for the Fifth Circuit, since it construed another and a different contract, in fact and in legal effect.

It is our opinion that whether the Circuit Court of Ap-

peals rightly or wrongly determined the question of re adjudicata, is not a material question on this application. It is not the failure of the Circuit Court of Appeals "to respect or observe the res judicata of the case established by the decision of the State Supreme Court," that authorises this Court under its decisions to grant the application. It is difference of opinion between the Federal and State Courts, likely to result in conflict of jurisdiction, that this Court has said is a ground for issuing the writ, and not the mere correctness vel non of the lower Court's decision on a question of res adjudicata. The decision of the Court of Appeals on this question was, however, correct. In the first place, the record failed to show any decision of the Supreme Court of Alabama. Again if the decision of the Supreme Court be considered though not set out in the record, it is apparent from the record that its decision was based on another and different contract from that presented to the Court of Appeals. The subject matter of the two decisions being different, no res adjudicata arises. Again the decision of the Supreme Court was on as mere interlocutory appeal from a ruling on demurrer, and its judgment was a mere reversal and remanding of the case for a new trial, and not such as to create res adjudicata between the parties. (Bucher vs. Cheshire R. R. Co., 125 U. S., 555.) Again by express provision of the Statute of Alabama (Code of Alabama, Sec. 683 A.) which has been in force since February, 1887, the opinion of that Court on a former appeal in the same case is not binding on it upon subsequent appeal, but it is required to decide the question as the law then appears to it. No case cited by counsel for petitioner on this question goes to the extent of holding that the decision of the State Court of last resort on appeal is binding on this Court on appeal after removal to the Federal Court, unless the State Court's decision would be binding on itself on a subsequent appeal. Under the Statute of Alabama, the decision of the Supreme Court of Alabama, when this case was before it on appeal

from the ruling of the lower Court on demurrer, would not be binding on it when the case came before it again on a subsequent appeal. No more would it be binding on this Court after removal. After removal the decision of the State Court is of equal but not greater obligatory force in this Court than it was in the State Court before removal. If it was binding on the State Court on a subsequent appeal, we are prepared to concede that it would be binding on this Court, or the Circuit Court of Appeals. As it is not binding on the Supreme Court of Alabama on a subsequent appeal. no more is it binding on this Court or on the Circuit Court of Appeals. The Statute takes away from the decision of the State Supreme Court the quality of res adjudicata. After remandment, the parties are not estopped either in the lower Court or in the Supreme Court again to litigate the same question. It would be the duty of the lower Court to follow the former decision of the Supreme Court of the State, not because the decision was res adjudicata as between the parties, but because the decision of a court of last resort, until reversed, is the law of the land, whether rendered in a case between the same or different parties. This relation does not hold good between a State and Federal Court on a question of general or commercial law. The question of res adjudicata, however, does not give the decision its binding force even on the lower court. So when the case comes by removal to the Federal Court, the decision, which was not res adjudicata as between the parties in the State Court, does not acquire that quality by removal. The decision has the same effect in the Federal Court that it did in the State Court. The Circuit Court of Appeals stood in the same position, exactly, as the Supreme Court of Alabama, and had the right to decide the question as the law then appeared to it, and without reference to the former decision of the State Supreme Court of Alabama. In the case of Northern Pacific Railroad Co. vs. Ellis, 143 U. S., 458, this Court in the second paragraph of the syllabus, say :—"In Wisconsin, the

decision of the State Supreme Court upon a demurrer is conclusive upon the questions legitimately involved, and is res adjudicata, and such Court has no power upon a second appeal of the same case to review that judgment nor can this Court do so." It is very clear that the binding force of the decision of the State Court on this Court is limited to cases where that decision is binding on the State Court itself on a subsequent appeal. In the case at bar, the decision of the State Court is by statute declared not to be binding on the State Court on a second appeal. For this reason the doctrine of res adjudicata invoked by petitioner has no application. Counsel for petitioner has cited no case where the decision of the State Court was held to be binding on this Court, unless it was also binding on the State Court. Section 683 A. of the Code of 1886 of Alabama, is as follows:

"The Supreme Court, in deciding each case, when there is a conflict between its existing opinion and any former ruling in the case, must be governed by what in its opinion at that time, is law, without any regard to such former ruling of the law by it; but the right of third persons, acquired on the faith of the former ruling shall not be defeated or interfered with by or on account of any subsequent ruling."

We respectfully submit that petitioner has made no case for the issuance of the writ of certiorari, and that his petition should be dismissed at his costs.

Respectfully submitted,

WALKER PERCY

and WILLIAM I. GRUBB,

Attorneys for Tennessee Coal, Iron & Railroad Co.

In Supreme Court of the United States

October Term 1898.

No. 174.

THE TENNESSEE COAL, IRON & RAILROAD CO.
Plaintiff-in-Error.

vs.

FRANK H. PIERCE, Defendant-in-Error.

On Writ of Certiorari to the United States Circuit Court of of Appeals for the Fifth Circuit.

ARGUMENT FOR TENNESSEE COAL, IRON & RAILROAD COMPANY ON ITS WRIT OF ERROR AND ON THE WRIT OF ERROR OF F. H. PIERCE.

STATEMENT OF CASE.

This was an action for the breach of a contract of employment, by the terms of which the defendant-in-error was employed by the plaintiff-in-error, the consideration of the employment over and above the work agreed to be done, being the release of a cause of action for an injury suffered by the defendant-in-error, while in the employment of plaintiff-in-error. The facts are largely undisputed. The

defendant-in-error was injured in a coal mine of the plaintiff-in-error in May, 1888. In November, 1888, and before the defendant-in-error was so far recovered as to be able to work, the parties to this suit had a verbal understanding by which the plaintiff-in-error agreed to give the defendant-in-error such supplies from its commissary as he might choose to take, pay him regular wages while disabled, and give him coal, wood and the benefit of the convict garden. This verbal agreement is recited in the written contract sued on. (Record Pages 31-2-3.) In May, 1889, after the defendant-in-error had resumed work a new contract was made between the parties by which the defendant-in-error was to be given such work as he could do, and to be paid therefor sixty dollars a month, and in addition free house rent, or in lieu of house rent a certain amount of supplies from the commissary of plaintiff-in-error, equal to the amount of house rent. This agreement was verbal and is recited in the original contract sued on (Record Pages 31-2-3.) This contract also recites that each of these propositions had been carried out before the written contract sued on was entered into. In June, 1890, a written contract was entered into between the parties by the terms of which it was agreed that the defendant-in-error should have the house rent instead of any supplies from the commissary, making his wages sixty dollars a month, and in addition to house rent, free coal and wood and the same benefit of the convict garden, as was allowed to others having that privilege, and in return the defendant-in-error agreed to release his cause of action against plaintiff-in-error for his injury and to do such work as he was able. This agreement appears in full with its recitals already referred to in the bill of exceptions of plaintiff-in-error. (Record Pages 31-2-3.) The facts showed that the defendant-in-error after the making of this contract, entered upon his employment with plaintiff-in-error thereunder, and continued under such employment, operating a stationary engine, which ran an air compressor at a coal mine for

over a year. That in May, 1891, the defendant-in-error ceased to work for plaintiff-in-error under the following circumstances: The plaintiff-in-error employed a convict named Dunn to run the compressor engine at night, which defendant-in-error ran in the day time. Dunn and the defendant-in-error had a misunderstanding about the work they were engaged on, the details of which, as testified to by defendant-in-error, appear in the bill of exceptions of plaintiff-in-error. (Pages 37-8.) Defendant-in-error, after this, went to his superior in the service and notified him that he would not work with Dunn, without assigning any reason therefor and went home, leaving the engine without any one to run it. The reason assigned by him for refusing to work with Dunn, *on the trial of the cause*, was that Dunn was a dangerous man and he was afraid of him. It was undisputed, however, that he did not assign any such reason or any reason, at the time he quit work. After the lapse of a period, varying according to different witnesses, from one to three days, plaintiff-in-error returned to his place of work and offered to go back to work, but without agreeing to work with Dunn, but the agent of plaintiff-in-error told him he had already put a man in his place and would not put him back. After this the letters which appear in the bill of exceptions of plaintiff-in-error (Record Pages 39-40), passed between the parties, and defendant-in-error did no more work for the plaintiff-in-error. The suit is instituted for the alleged breach of this written contract of employment, the alleged breach consisting in the refusal to allow the defendant-in-error to go back to work after he had quit work under the circumstances detailed, and in refusing to pay him the compensation provided for by the contract.

The principal questions presented by the writ of error are four:

First—Was the written contract sued on, a contract whose term was the disability of the defendant-in-error in the sense that if his injury was permanent, the contract

extended during his life, or was it a mere contract of hiring from month to month or at will.

Second—Has this question become res adjudicata by reason of the decision of the Supreme Court of Alabama.

Third—Did the refusal of the defendant-in-error to continue work at the compressor engine, to which he had been assigned under his contract, because of his disinclination to work with Dunn, justify the plaintiff-in-error in refusing to proceed with the contract.

Fourth—If entitled to recover at all, was the defendant-in-error entitled to recover damages beyond the time of trial, and what was the proper measure of damage, to which he was entitled.

The first and second questions are raised by the assignment of error to the Court's action in overruling plaintiff-in-error's demurrer to the complaint as amended (Assignment 1½) to the Court's action in giving the written charge requested by the defendant-in-error (Assignment 16) to the Court's action in overruling plaintiff-in-error's objection to the testimony as to the extent of defendant-in-error's injuries. (Assignment 3.)

The third question is raised by the assignment of error to the Court's action in sustaining defendant-in-error's demurrer to plaintiff-in-error's second plea, and in refusing the second and third written charges requested by the plaintiff-in-error. (Assignments 1-18-19.) Also Assignments numbered 7, 8 and 9, relating to the Court's action in admitting testimony as to the character of the convict Dunn, the threats made by him towards defendant-in-error and defendant-in-error's reason for refusing to work with him.

The fourth question is raised by the assignments of error predicated on the action of the Court below in giving the written charge requested by defendant-in-error (Assignment 16) and in refusing the sixth and seventh written charges requested by plaintiff-in-error. (Assignments 22-23).

The contract sued on appears on its face to have been executed by G. B. McCormack and defendant-in-error, and the sufficiency of this method of execution to bind plaintiff-in-error is raised by the second assignment of error, based on the Court's action in admitting the contract in evidence.

The 4, 5, 13 and 14th assignments of error are predicated on the Court's refusal to allow proof of the two verbal agreements mentioned in the recitals of the contract sued on.

ASSIGNMENTS OF ERROR RELIED ON.

1. The Court erred in sustaining plaintiff's demurrer to the second plea of defendant.

1½. The Court erred in overruling the defendant's demurrer to the plaintiff's complaint as amended.

2. The Court erred in overruling defendant's objection to the introduction of the written contract sued on in this case in evidence.

3. The Court erred in overruling the objection of defendant to the following question: "State what were the extent of your injuries so received?" propounded by plaintiff's counsel to the plaintiff himself. The answer to the question was: "My left hand was crushed, and the little finger cut off. I can only bend my left hand now partially at the fingers. It was a good hand before I was hurt. My leg was broken at the ankle, and a piece of bone two and a half inches long taken out, and that made one leg shorter than the other, as it still is. My injured leg pains me now when I stand on it any length of time down in the ankle. I can only partially bend my foot."

4. The Court erred in sustaining plaintiff's objection to the following question propounded to plaintiff by defendant's counsel, viz: "State the conversation and agreement made and had between you and Mr. McCormack with reference to what the company would do for you when the first agreement was made in November, 1888."

5. The Court erred in sustaining plaintiff's objection to the following question, propounded to plaintiff by defendant's counsel, viz: "State what the agreement between you and Mr. McCormack was which was made in May, 1889."

7. The Court erred in overruling defendant's objection to the following question propounded by plaintiff's counsel to plaintiff himself, viz: "What was Dunn's character for peace and quiet?" The answer to the question was: "When he was in liquor he was bad, and when he didn't have liquor he was all right."

8. The Court erred in overruling defendant's objection to the following question, propounded to the plaintiff by his counsel, viz: "Did Dunn make any threats in talking to you?" The answer was: "He told me to get out at once and started towards me. I had picked up a lantern and asked him how it had got there, and he said, 'it is none of your damn business; you get out of here and keep out or I'll kick you out,' and he started toward me, and I went out and aint been back since."

9. The Court erred in overruling the defendant's objection to the following question, propounded to plaintiff by his counsel, viz: "Did you refuse to work with him on account of your personal danger?" The answer was: "I did."

13. The Court erred in sustaining plaintiff's objection to the following question, asked by defendant's counsel, of the witness McCormack, viz: "In November, 1888, when you first agreed to pay plaintiff's wages while he was disabled, state whether or not he made any agreement to release his cause of action for injury received against the company."

14. The Court erred in sustaining plaintiff's objection to the following question, asked by defendant's counsel, of witness McCormack, viz: "Do you remember plaintiff's being paid a lump sum of several hundred dollars before he

started to work, after he was hurt, if so, state the circumstances as well as you can."

16. The Court erred in giving to the jury at plaintiff's request, the following written charge: "Under the evidence in this case, I charge you that the plaintiff is entitled to recover in this action, and the measure of his damage is the aggregate amount of all the installments of seventy dollars for each month in default and unpaid from the time of the commencement of the employment under the contract sued on until the time of the trial, with interest on each installment from the time it fell due up to the time of the trial, which amounts under the evidence to the sum of $5,893.00."

17. The Court erred in refusing to give to the jury at the request of the defendant the following written charge, numbered one: "If the jury believe the evidence in this case, they must find a verdict for the defendant."

18. The Court erred in refusing to give to the jury at defendant's request the second written charge, viz: "If the jury believe the evidence in this case, they must find that the plaintiff left the defendant's service wrongfully and without legal excuse."

19. The Court erred in refusing to give to the jury at defendant's request the third charge in writing, viz: "If the jury believe from the evidence that the plaintiff left the service of the defendant wrongfully and without legal excuse, then the jury must find for the defendant."

22. The Court erred in refusing to give at defendant's request the sixth written charge: "If the jury believe from the evidence that the plaintiff wrongfully left the service of the defendant, then the jury must find for the defendant under its plea of recoupment and assess such damages as the jury may believe from the evidence the defendant may have sustained from the loss of plaintiff's services during the term of the contract."

23. The Court erred in refusing to give at defendant's request the seventh written charge, viz: The value of the benefit which the jury may believe from the evidence, the defendant would have derived from the continued performance of the work, which plaintiff was required to do under the contract, during the term of the contract, is to be deducted from the amount, the jury may believe from the evidence the plaintiff would have earned under the contract during its term, had it not been terminated, when the jury come to assess the damages.

24. The Court erred in refusing to give to the jury at defendant's request the eighth written charge, viz: If the jury believe from the evidence in this case that Pierce, at the time he was discharged by defendant was no longer disabled within the contemplation of the contract sued upon. then the jury must find a verdict for the defendant.

PROPOSITIONS OF LAW AND FACT.

I.

The contract sued on was for an indefinite time and terminable at the will of either party thereto.

In this country, the rule is general that a hiring at a certain rate per day, month or year, merely fixes the rate of wages and does not fix any definite time for the employment.

At most the duration of the employment is fixed by the period of estimating the wages.

"A servant is presumed to have been hired for such length of time as the parties adopt for the estimation of wages." 14 Am. & Eng. Encyc. Law, page 762.

"With us the rule is inflexible, that a general or indefinite hiring is prima facie a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is on him to establish it by proof. A hiring at so much a day,

week, month or year, no time being specified, is an indefinite hiring, and no presumption attached that it was for a day even, but only at the rate fixed for whatever time the party may serve. It is competent for either party to show what the mutual understanding of the parties was in reference to the matter; but unless their understanding was mutual that the service was to extend for a certain fixed and definite period it is an indefinite hiring and is determinable at the will of either party, and in this respect there is no distinction between domestic and other servants." Wood Master Servant, Sec. 136, Page 283-4.

Franklin Co. vs. Harris, 24 Mich. 115.
Parsons on Contracts, 519.
Howard vs. E. T. V. & G. R. R. Co., 91 Ala. 270.
Clark vs. Ryan, 95 Ala. 409.
De Briar vs. Minturn, 1 Cal. 450.
Tatterson vs. Suffold Mfg. Co., 106 Mass. 56.

The contract sued on stipulates no definite time of employment. Its language is: "Now therefore it is agreed that in view of the above propositions, *which have been faithfully carried out*, that my wages from this date are to be $65 per month, etc." How many months this employment is to last is nowhere stated. Nor is there any intimation in any part of the written contract itself from which any definite duration to the employment could be inferred. Without reference to the former contracts recited therein, there is to be found nothing to fix the duration of the employment. The case has been to the Supreme Court of Alabama, that Court, however, has never construed the identical contract here sued on, as is hereinafter shown. The opinion of the Supreme Court of Alabama, so far as it relates to this proposition is as follows: "As to the first proposition our opinion is, without entering into any discussion of the reasons which support it, that the contract is sufficiently definite as to time, and bound the defendant

to its performance so long as plaintiff *should be disabled by reason of the injuries which he received*, which under the averment that he was permanently disabled, will be for his life." We submit that the admitted failure of the Court to enter into any discussion of the reasons for their opinion, deprives that opinion of very much of the weight it would otherwise have. A mere statement of its conclusion that the contract was to last during the disability of the defendant-in-error, is unconvincing and unsatisfactory. The Court will observe that there is no mention of the plaintiff's disability in the contracting part of the agreement sued on. Nor is there any mention of such disability in the recital of the second contract made between the parties. The only mention of it occurs in the recital of the first verbal contract made in November, 1888. Unless the contract sued on was a mere modification of the first verbal contract, it is clear that the mention of the period of defendant-in-error's disability in the first contract can have no influence on the last and litigated contract. The important inquiry then is: "Is the first verbal contract made in 1888 the basis of the written contract sued on in such sense that the written contract is a mere modification of it? The defendant-in-error was injured in May, 1888, and in November, 1888, while he was still disabled from work because of his injuries, he entered into a contract with plaintiff-in-error by parol by the terms of which, the plaintiff-in-error was to "pay me regular wages while I was disabled," etc. This contract is recited in the written contract sued on, and this is the only mention of "disability" as the period of the contract. The written contract further recites that "said proposition was accepted by me and *carried out by the said company*," and that, "in May, 1889, *after I had resumed work*, a further proposition was made *to give me work such as I could do*, paying me therefor the wages paid me before said accident, etc." In this second verbal agreement, there is no mention that the agreement was to continue during the disability of the defendant-in-

error. The first verbal agreement was made while the defendant-in-error was still not recovered from his injuries so that he could work, and was not a contract for work or that required work of him. It did not contemplate that defendant-in-error was to be paid any wages in the sense that they were to compensate him for the labor to be performed. It was simply an agreement to continue his wages, regardless of his capacity to work, or in view of his incapacity to work, and for that reason, until his disability to labor ceased. No release of his cause of action for his injuries is stipulated for so far as the recital shows. On its face, it appears to have been a mere gratuitous unenforceable agreement to continue to pay defendant-in-error his time so long as he was unable to work. Such agreements without other or further consideration than the moral duty to support a helpless servant, who has been injured in the service of the master, are not uncommon. The duration of it, manifestly in the contemplation of the parties, was the duration of the cause that provoked it, i. e., the inability of the defendant-in-error to make his own living because he had not recovered from his injuries. The gist of the agreement and the provoking cause of it, was that inability to work, and the consequent impossibility of defendant-in-error's taking care of himself. "Pay me regular wages while I was disabled" evidently means to pay me while I was doing nothing by reason of my injuries, the same wages I got while I was working, before I was injured. Taken in this sense, "while I was disabled" must mean while I was unable to work. This is a very different sense from that sought to be injected into it by counsel for defendant-in-error, i. e., the equivalent of permanent injury. A man who loses his little finger by an accident may be disabled for a week or more from work, and his employer might be willing to continue his wages while thus disabled. When he returned to work, his disability would cease, but his injury would be permanent. Under a promise on the part of the master to pay such a person wages while dis-

abled, would any one contend that the master, the promise being otherwise enforceable, could be compelled to pay his wages for life, because his injury was permanent. His injury, it is true, was permanent, but his disability was temporary. So with the defendant-in-error, his injury may have been permanent, his disability however ceased when he resumed work. The parties themselves give the strongest possible practical construction of this use of the word by their subsequent conduct. In May, 1889, when the written contract recites that the defendant-in-error had resumed work, and the first agreement had been carried out, they mutually feel it necessary to make a new agreement. What change of facts is there in the situation of the parties that makes this new contract a necessity? The only change is that the defendant-in-error had "resumed work." And the parties characterize the new agreement as "a further proposition made *to give me work*." As soon as defendant-in-error was able to resume work, the parties at once enter into a new agreement to give him work. They recognize by this both that the first contract was not a contract for work and that it was a contract to last only while no work was possible. When work on the part of defendant-in-error first became possible, they mutually enter into an agreement to provide for the terms of the service. In this agreement there is not a word said of its continuing during the disability of the defendant-in-error. The parties thus recognized that the disability had ceased, and for this reason, had no place in a contract which was to provide for work. Yet the Supreme Court of Alabama would import by implication into this second contract the words "while he was disabled" from the first contract, in spite of the recitals that the first contract had been carried out, in other words, that the disability had ceased before the second contract was entered into, and that the second contract was made after defendant-in-error had resumed work. These words could not be imported rationally into the second agreement, unless with the meaning of "permanent injury" for the second

agreement itself was based on the idea of defendant-in-error's restored ability to work. That these words did not have this meaning in this first agreement we have shown. By what rule of construction, can they be imported into the second agreement with a changed meaning. These two agreements were not of the same class, one alone was for the performance of work. Each was complete in itself without aid from the other. There is no reason for any inference that any of the terms of the first were continued by implication into the second. The third agreement, which is the one sued on, purports on its face to be a mere modification of the second, and we concede that if the second was to last during the plaintiff's disability, the third, with some show of reason, might be held to do so also. The third does not recite that the second had been carried out (that is "completed") but that it has been "*kept* by both parties," (that is, "observed by both parties,") and in view of that fact and the mutual opinion that it was better for the defendant-in-error to have house rent than supplies, the modification is made. It is confessedly on its face a modification, and is radically different in this respect from the second agreement, which clearly appears to be a new contract on a new subject matter from the first agreement. In the third agreement, like the second, there is no word or intimation that the contract was to last during the disability of defendant-in-error, for the very obvious reason that at the time it was entered into, the parties regarded defendant-in-error's disability as having come to an end by his resumption of work. This agreement was made in June, 1890, and unless the words: "while I was disabled," which appear only in the first agreement made in November, 1888, are read from that agreement through the second agreement into the written contract sued on, there is admittedly nothing in this written contract sued on, to take it out of the general rule laid down by the authorities that a general or indefinite hiring, one in which the rate alone can be referred to in fixing the

duration, is terminable at the will of the parties thereto. We submit that the first contract not being a contract for work and labor is essentially of a different character from the second, which is a contract for work and labor, and therefore the second cannot be a mere modification of the first. We submit further that if the words "while I was disabled," could in any event be imported into the second contract from the first, they could only be so imported with the same meaning that they were given in the first contract "disability to work and labor."

Importing these words into the second agreement with this meaning, they become manifestly out of place, since this second agreement recites that it was not made until after defendant-in-error had resumed work, and provided by its terms for the performance of work by defendant-in-error.

This question is presented by assignment of error, numbered 1½ (Record Page 51) predicated on the overruling of plaintiff-in-error's demurrer to the complaint as amended; by the third assignment of error; by the sixteenth and seventeenth assignments of error, predicated on the general affirmative charges, given at defendant-in-error's request and refused at plaintiff-in-error's request.

II.

It is contended that the construction of this contract has become res adjudicata as between the parties to this suit by the decision of Supreme Court of Alabama on appeal from a ruling on demurrer. We submit the record fails to show that there is any res adjudicata.

a. It fails to show any decision of the Supreme Court of Alabama in the case. This is admitted.

b. If this Court goes beyond the record it is clear after examination of the Court's opinion that the Supreme Court of Alabama, does not differ in its construction of the contract sued on from the Circuit Court of Appeals, because

the Supreme Court of Alabama never construed the contract, which the Court of Appeals had presented to it. The case was appealed to the Supreme Court of Alabama from a ruling of the lower Court on demurrer to the complaint. The written contract was set out in the complaint but set out incorrectly. The Supreme Court of Alabama only construed the contract as it was incorrectly copied in the complaint. The petitioner after the case was removed to the Federal Court corrected the written contract by amending his complaint. The amendment appears in the the record (pages 25-26.); the contract, as it appeared before amendment, in the record (pages 13-14.) Petitioner contends that the amendment did not change the legal effect of the written contract, because the omitted portion, inserted by amendment into the contract, was in a recital of a former parol contract on the same subject matter between the same parties, and not in the "contracting" part of the written contract. The contract sued on was a contract of hiring, and its duration was the doubtful point upon which construction was sought. Petitioner contended that it was to last during disability and not from month to month. Two former contracts between the same parties on the same subject matter had been entered into, and their terms were recited in the written contract sued on. The first of these contracts by its express terms was to last while petitioner was disabled. The second and the written contract sued on made no mention of the duration of the term of employment. The contention of petitioner was that a proper construction of the written contract showed that it was a mere modification of the first verbal contract recited in it, and that for this reason the period of duration in the first agreement should be imported into the third, or written contract, by implication, making it one to last during the disability of petitioner. The defendant on the other hand contended that the third contract was an independent, separate contract from the first, but conceded that the third or written contract was a mere modification of the

second. On this question of construction, was the omission of the clause, inserted into the contract sued on by amendment, material? It is clear that it was. Before the amendment, by the terms of the second contract, the petitioner was entitled to $60.00 a month and free house rent. He had no option to insist on commissary supplies in lieu of house rent —had no right to supplies at all. The third or written contract—that sued upon—recites that the parties agreed that it would be better for petitioner to have house rent than supplies of equal amount, and modified the previous agreement by taking away his option to demand supplies instead of house rent. As before the amendment was made, petitioner's only right to supplies, as appeared from the contract then sued on, was found in the first contract recited, it was necessary to refer back from the third contract to the first, in order to account for the obligation mentioned in the third on the part of defendant to allow petitioner supplies from its commissary. Under this incorrect statement of the contract, the Supreme Court of Alabama may have been right in construing the contract to be one for the disability of petitioner, on the theory that the third and written contract—the one sued on—was necessarily a mere modification of the first, because its terms were unintelligible unless referred back to the first. The amendment made by the petitioner after the removal of the case, did away with any necessity for looking back to the first contract recited in order to make the written contract sued on intelligible. As we have stated the second contract before amendment provided that petitioner should be allowed only house rent and $60.00 a month wages—it provided for no supplies in lieu of house rent. The amendment was as follows: "or in lieu of house rent, a certain amount of supplies from the convict commissary at No. 2 prison, which supplies were to amount to about the sum paid me for house rent." These words were inserted by the amendment in the written contract sued on, immediately after the words "$60.00 a month and in addition free house rent," appearing in the recitals of the terms

of the second contract. The amendment made it apparent that the reference in the third and written contract—that sued upon—to "supplies of about equal amount from the commissary" was to the second contract, of which plaintiff-in-error conceded the written contract was a modification—and not to the first contract, of which plaintiff-in-error denied the written contract sued on was in anywise a modifition. The issue is, was the clause inserted in the written contract—that sued on—by amendment, after the case had been reversed by the Supreme Court of Alabama, material in its construction. That it has a material bearing in determining whether the written contract is a separate, independent contract from the one first recited in it, is evident, and this was the vital question considered by the Court in determining whether the written contract was for any certain duration, since it was conceded that no duration was expressly mentioned in it, except as such duration could be arrived at by looking to the first contract, recited therein. We submit that, as a matter of fact, the Supreme Court of Alabama has never decided what the proper construction of the corrected contract was, since that contract was never submitted to it.

c. Again the decision of the Supreme Court was on a mere interlocutory appeal from a ruling on demurrer, and its judgment was a mere reversal and remanding of the case for a new trial, and not such as to create res adjudicata between the parties.

Bucher vs. Cheshire R. R. Co., 125 U. S., 555.
Gardner vs. Michigan Cen. R. R. 150 U. S. 349.

d. Again by express provision of the Statute of Alabama (Code of Alabama, Sec. 683 A.) which has been in force since February, 1887, the opinion of that Court on a former appeal in the same case is not binding on it upon subsequent appeal, but it is required to decide the question as the law then appears to it. No case cited by counsel

for petitioner on this question goes to the extent of holding that the decision of the State Court of last resort on appeal is binding on this Court on appeal after removal to the Federal Court, unless the State Court's decision would be binding on itself on a subsequent appeal. Under the Statute of Alabama, the decision of the Supreme Court of Alabama, when this case was before it on appeal from the ruling of the lower Court on demurrer, would not be binding on it when the case came before it again on a subsequent appeal. No more would it be binding on this Court after removal. After removal the decision of the State Court is of equal but not greater obligatory force in this Court than it was in the State Court before removal. If it was binding on the State Court on a subsequent appeal, we are prepared to concede that it would be binding on this Court, or the Circuit Court of Appeals. As it is not binding on the Supreme Court of Alabama on a subsequent appeal, no more is it binding on this Court or on the Circuit Court of Appeals. The Statute takes away from the decision of the State Supreme Court the quality of res adjudicata. After remandment, the parties are not estopped either in the lower Court or in the Supreme Court of the State again to litigate the same question. It would be the duty of the lower Court to follow the former decision of the Supreme Court of the State, not because the decision was res adjudicata as between the parties, but because the decision of a court of last resort, until reversed, is the law of the land, whether rendered in a case between the same or different parties. This relation does not hold good between a state and Federal Court on a question of general or commercial law. The question of res adjudicata, however, does not give the decision its binding force even on the lower State court. So when the case comes by removal to the Federal Court, the decision, which was not res adjudicata as between the parties in the State Court, does not acquire that quality by removal. The decision has the same effect in the Federal Court that it did in the State Court. The

Circuit Court of Appeals stood in the same position, exactly, as the Supreme Court of Alabama, and had the right to decide the question as the law then appeared to it, and without reference to the former decision of the State Supreme Court of Alabama. In the case of Northern Pacific Railroad Co. vs. Ellis, 144 U. S., 458, this Court in the second paragraph of the syllabus, say:—"In Wisconsin, the decision of the State Supreme Court upon a demurrer is conclusive upon the questions legitimately involved, and is res adjudicata, and such Court has no power upon a second appeal of the same case to review that judgment nor can this Court do so." In the opinion, after stating that in Wisconsin a decision on an appeal from an order overruling or sustaining a demurrer was res adjudicata, between the parties, the Court said: "Its conclusion had been announced, its mandate had gone down, and it had no power upon a second appeal to review that judgment. This is the settled rule in Wisconsin. *Under these circumstances* the judgment of the Supreme Court is not subject to review here." The Court expressly limit the application of the doctrine of res adjudicata to cases where the decision is binding on the State Court of last resort. It is very clear that the binding force of the decision of the State Court on this Court is limited to cases where that decision is binding on the State court itself on a subsequent appeal. In the case at bar, the decision of the State Court is by statute declared not to be binding on the State Court on a second appeal. For this reason the doctrine of res adjudicata invoked by petitioner has no application. Counsel for petitioner has cited no case where the decision of the State Court was held to be binding on this Court, unless it was also binding on the State Court, or on the parties in the State Court. Section 683 A. of the Code of 1886 of Alabama, is as follows:

"The Supreme Court, in deciding each case, when there is a conflict between its existing opinion and any former ruling in the case, must be governed by what in its

opinion at that time, is law, without any regard to such former ruling of the law by it; but the right of third persons, acquired on the faith of the former ruling shall not be defeated or interfered with by or on account of any subsequent ruling."

Bucher vs. Cheshire R. R. Co., 125 U. S. 555.
Scotland County vs. Hill, 132 U. S. 107.
Gardner vs. Mich. Cent. R. R. Co., 150 U. S. 349.

III.

The wrongful quitting of the work imposed upon the defendant-in-error by the terms of the contract sued on would justify the plaintiff-in-error in refusing to proceed with the contract, and in declining to further pay the compensation provided for in it. The facts as to defendant-in-error's quitting work were such as to make it a question for the jury as to whether such quitting was with legal excuse, if they did not, as matter of law, show that such quitting was without legal excuse. Assignments of error Nos. 1, 7, 8, 9, 16, 18 and 19. Record Pages 50-2-3.

Authorities on this proposition:

Dorst vs. Mathieson Alkali Works, 81 Fed. 284.
Pope vs. Lathrop, 46 N. E. Rep. 154.
Norris vs. Moore, 3 Ala. 677.
Spain vs. Arnott, 2 Stark, 256.
Lantry vs. Parks, 8 Cowen, 63.
Winn vs. Southgate, 17 Vt., 355.
Posey vs. Garth, 7 Mo., 94.
Renno vs. Bennett, 3 Q. B., 768.
Turner vs. Mason, 14 M. & W., 112.
Ford vs. Danks, 16 La. Ann. 119.
14 Am. & Eng. Encyc; XIV, pages 788-9 and note.
Wood, Master & Servant, Sec. 116, page 219, Sec. 119, page 227.

The undisputed facts attending the quitting of the work, defendant-in-error was employed at and assigned to, are that the defendant-in-error had been working on opposite shifts with a convict named Dunn, with whom he had fallen out. On one Sunday morning, shortly before his discharge, defendant-in-error went to his superintendent and told him he couldn't work with Dunn. Dunn had been off for two weeks, and defendant-in-error had just heard that he was to be put back. To quote his own language (Page 36, Record): "I told Mr. Rogers I couldn't work with him. He said: 'I don't see why you can't.' I said: 'I will work with anybody else, but I can't work with Dunn.' And the next Monday morning I went to Mr. Rogers and said: 'I am ready to go to work any where you put me.' He said: 'You won't work with Dunn.' And I said: 'I can't work with Dunn.' * * * * After the conversation I had with Mr. Rogers Sunday morning, I went to the compressor and stayed all day with it. After the conversation I had with Mr. Rogers Monday morning I went back home and told Mr. Rogers I would be there if he wanted me, and then in the forenoon or afternoon, he gave me my discharge and I gave it back. I don't know who ran the compressor after Monday. I never ran it any more." On page 38 of the Record, defendant-in-error's testimony shows that he had had a personal difficulty with Dunn, who he claimed was a dangerous man, and that personal fear of Dunn was the reason that induced him to decline to work with him or rather on opposite shifts with him. There is no contention that this ground for refusing to work with Dunn was ever communicated to plaintiff-in-error or its agents at any time before the trial of the cause. Defendant-in-error's own testimony shows that he was asked by Rogers why he couldn't work with Dunn, and it also shows that he gave Rogers no reason for refusing to do so. (Record, Page 38-39.)

The plaintiff-in-error on the trial objected to the testi-

mony relating to Dunn's character, to the personal difficulty between Dunn and defendant-in-error and to the statement by him of his uncommunicated reason for declining to work with Dunn. (Record, Page 38, Assignments Nos. 7, 8 and 9.) The grounds of objection were that the evidence was immaterial for two reasons. Conceding that it had been communicated to plaintiff-in-error at the time of the refusal, it would have been an insufficient ground for the disobedience. Not having been communicated to plaintiff-in-error at all, it could have no effect on the rightfulness of plaintiff-in-error's action in discharging defendant-in-error.

A servant is bound to obey all reasonable orders of his master, and a failure or refusal to obey an order, when wilful, justifies the master in terminating the contract of employment, if the master elects to do so. The testimony of the defendant-in-error shows that he was assigned to run the engine at the compressor by plaintiff-in-error. (Record, Page 39.) A refusal to continue at this work on the part of defendant-in-error would be a disobedience of an order of his employer, and could be justified only on the ground that such order was unreasonable. That the order was originally a reasonable and proper order is not disputed. It is contended that it became unreasonable only by virtue of the fact that defendant-in-error and Dunn had fallen out and that defendant-in-error was afraid of Dunn. The undisputed testimony (that of defendant-in-error himself, Record Page 36) shows that defendant-in-error ran the engine in the day time, and that until four o'clock in the afternoon Dunn was not near the engine at all. Dunn was on the night shift and came on at four in the afternoon. Defendant-in-error would stay about the engine until five or six in the evening and then go home and not come back till seven next morning when Dunn went home. The engine was in the open air, not in any mine underground. There were men working near the engine and guards close to it at the mouth of the slope. Defendant-in-error himself testified

that Duun was all right except when he was in liquor, and that he was infrequently in that condition. (Record, Page 38.) At the time of the personal difficulty with Dunn, defendant-in-error made no complaint to Rogers of it, and worked two weeks after, but during this time Dunn was sick. (Record, Page 39.) Boiled down, it appears from the undisputed testimony that the only justification dedendant-in-error had for refusing to work with Dunn was that he considered him a quarrelsome man when drunk; that he rarely got drunk; that he had had a verbal misunderstanding with him, and claimed to be afraid of him. The testimony shows that the real and ultimate objection defendant-in-error entertained to working with Dunn was that he had had a difficulty with him, and it would be unpleasant to associate with him. No reasonable man could be afraid to work with another, who was a convict, in the presence and immediate neighborhood of guards and free white laborers, especially where the convict is admittedly a peaceable, well-disposed man except when drunk, and it is hardly probable that a convict running a stationary engine would be allowed to go on duty when drunk.

Muller vs. Gilkinson, 19 Vt. 503.
Patterson vs. Gage, 23 Vt. 558.

Our contention is that such facts as matter of law are insufficient to justify a servant in refusing to work at the task assigned him by his master. If not as matter of law, clearly, the plaintiff-in-error was entitled to go to the jury on this question. The court below in refusing to give the third charge requested by plaintiff-in-error (Assignment 39, Page 53), as well by giving the charge requested by defendant-in-error (Assignment 16, Page 53) withdrew the issue of wrongful conduct on the part of defendant-in-error from the case. Wood in his work on Master and Servant Section 119, Page 227, says: "Refusing to obey the reasonable orders of the master is a good ground for dismissal

from service, for in every contract of hiring there is an implied contract on the part of the servant that he will obey the reasonable and lawful commands of his master. But if the command of the master involves the doing of an unlawful act, or is unreasonable, involving services not connected with his employment, or within its contemplation, or which would expose the servant to hazards and dangers not incident to the business, the servant may refuse to obey without subjecting himself to dismissal on legal ground. *But in all such cases the question of reasonableness is one of fact*, and the servant would be required to establish the unreasonable character of the command by evidence that is clear and unequivocal, *as the law will not tolerate insubordination on the part of servant, unless it clearly supported by a legal and valid excuse.* But in determining this question, reference must always be had to the contract, the nature and character of the business for which the servant was employed, and the command itself. What might be regarded as insubordination in a servant employed in one capacity, might not be so regarded of a servant in another, *therefore the question is one of fact for the jury.*" The plaintiff-in-error was at least entitled to have this issue submitted to the jury. It was taken from the jury by the general affirmative charge given at request of defendant-in-error.

Up to this point, we have discussed this question on the idea that the reason, assigned by defendant-in-error on the trial for refusing to work on the compressor engine, if Dunn worked the opposite shift, was communicated to the plaintiff-in-error or its agent at the time of such refusal, and even in this aspect of the case we contend it was either insufficient as a matter of law or at least left the sufficiency a question for the jury to determine. In view of the fact that the testimony is undisputed that the defendant-in-error though requested to do so, failed to give any reason for his refusal to work with Dunn to Rogers at the time of his refusal and discharge or at any time after until the trial of his cause, we submit that the excuse was clearly insufficient

as matter of law, and that the court should have so charged as requested to do by the second written charge of plaintiff-in-error. (Assignment 18, Page 53), and should have excluded the testimony covered by Assignments 7, 8 and 9. In the case of Turner vs. Mason, 14 M. & W. 112, the servant absented herself from her master's service against orders to visit her dying mother. Baron Parke in the opinion in this case, said: "Even if the replication disclosed that he had notice of the cause of her request to absent herself, I do not think it would be sufficient to justify her disobedience of his order." In speaking of this case, the annotator of Wood on Master and Servant, says: "But it should be remarked that the evidence in this case did not disclose that the *master knew that the mother was dangerously ill* or that the *servant informed him that that was the cause of her absence.* It may be doubted whether the Courts of this country would regard the disobedience of such an order, under such circumstances, *the master having notice of the cause of its violation*, as such evidence of insubordination as would justify the servant's dismissal; indeed, it would seem that such an order might be regarded as unreasonable." (Wood Master & Servant 2nd edition, page 228 note.) We have no hesitation in agreeing with the annotator as to the unreasonableness of such an order if the master knew the circumstances. In the absence of such knowledge, the order would be perfectly reasonable. So in this case, if it could be contended that Rogers' order for defendant-in-error to continue work at the compressor engine with Dunn was unreasonable in any event, it could only be on the assumption that Rogers knew or was informed by defendant-in-error of the facts that he relied on to justify his refusal. Defendant-in-error's own testimony shows that he not only refused to continue work with Dunn, but also refused to state his reason for so refusing. (Record Page 38-39.) No clearer case of wilful disobedience to orders of the master could be imagined, and we submit that such disobedience justified the instant discharge of defendant-in-error.

Having been legally discharged, his subsequent offer to return, imposed no duty on plaintiff-in-error to take him back. Mere absence for a day without any wilful disobedience of orders has been held to justify the master's refusal to take back the servant on his offer to return. (Ford vs. Danks 16 La., Ann. 119-Wood, pages 219-220, Sec. 116.) The test of such right to discharge depends not on the length or duration of the absence from the service, but upon the necessity of the presence of the servant and the consequent injury to the master's business. Defendant-in-error was running a steam engine. His constant presence was absolutely necessary to the master's business. This he admits himself. (Record, page 39.) Any absence, however short in duration, would justify the master in refusing to take the servant back under such circumstances. When the refusal to obey the order is wilful and without legal excuse, no offer to return after such disobedience on the part of the servant will require the master to take the servant back. In the case of Lantry vs. Parks, 8 Cowen 64, the Court says: "It is supposed that the offer to return should take this case out of the general rule. But if there was a wanton desertion of the defendant's service, without his fault, the plaintiff was guilty of a violation of the contract, and the defendant was under no obligation to receive him again. No cause whatever is shown in the case, for the plaintiff's conduct." And in Wood on Master & Servant, Sec. 162, page 318, it is said: "Where the servant abandons the master's service, the contract is at an end, to such an extent that the servant cannot require the master to restore him to his service under the contract." The Court will observe that defendant-in-error never offered to return to work unconditionally. He coupled his offer with the stipulation that he should not be required to work with Dunn. (Record, page 36.) Even his letter written four days after he quit, does not expressly withdraw this condition. (Record, pages 39-40.)

The Court below held that a voluntary and inexcusable

abandonment of the service of the plaintiff-in-error by the defendant-in-error would not be a defense to this action, and on this theory sustained a demurrer interposed to the second plea of the plaintiff-in-error. (Assignment of error 1, page 50.) This was on the idea that there could be no recission of the contract, as there could be no complete restoration of the consideration moving from the defendant-in-error. The correctness of this ruling, we discuss hereafter in this brief. If it be conceded to be correct, the refusal of the Court to give the sixth written charge requested by plaintiff-in-error, (Assignment No. 22, page 54) presents the question disembarrassed from any such legal question. The plaintiff-in-error filed a plea of recoupment to which no demurrer was interposed. On this plea, it asked a charge that if the jury believed the defendant-in-error quit the service of the plaintiff-in-error without legal excuse, the jury should find for the plaintiff-in-error under its plea of recoupment and assess such damages as they might believe from the evidence were sustained by plaintiff-in-error from such wrongful quitting of its service by defendant-in-error. The effect of the refusal of this charge was to hold as matter of law that the defendant-in-error had not wrongfully quit the service of the plaintiff-in-error, under the evidence in the case. The determination of this question was for the jury and the plaintiff-in-error was entitled to have this charge given. The damages under this plea were not limited to four days as contended by counsel for defendant-in-error, because plaintiff-in-error was under no obligation to take defendant-in-error back after he quit without excuse. The reasonable value of his services were shown to be sixty or sixty-five dollars a month. (Record Page 43.)

It was successfully contended by counsel for defendant-in-error in the trial court that if the defendant-in-error had wilfully refused to work, or even had fraudulently intended at the time of entering into the contract to do no work, and no work had ever been done, the plaintiff-in-

error could not rescind the contract for that reason, since it never could restore the main consideration received, viz: the release of the cause of action for defendant-in-error's injury. For this reason the Court sustained a demurrer to the second plea (Assignment No. 1, page 50), and refused to give the second and third charges requested by plaintiff-in-error (Assignments Nos. 18 and 19, page 53), and gave the affirmative charge requested by defendant-in-error (Assignment 16.) Counsel for defendant-in-error contends that the second plea was bad because it did not answer the whole complaint. This is manifestly incorrect. Its purpose was to completely defeat a recovery by showing a rightful discharge of defendant-in-error. If the proof had sustained it without conflict, the court would have charged the jury to find for plaintiff-in-error. It clearly answered the complaint in full. We do not dispute the rule that when a defrauded party seeks to rescind a contract because of fraud in its inception it is essential that he first restore the consideration received by him from the party to whom it is to be restored. Has this rule any application to the case at bar? Is the plaintiff-in-error seeking a recission of the contract sued on? In the cases relied on by counsel for defendant-in-error in his brief, the parties against whom this rule was successfully invoked were the actors in the suit, seeking to set aside the contract and recover back what they had parted with to the defrauding party, and the Court held that they could not recover back what they had paid out on the contract without restoring what they had received from the defrauding parties. In the case at bar, there is no question of rescinding for fraud, nor any question or claim of fraud or of rescission at all. The plaintiff-in-error was not the actor or plaintiff in the court below, but was the defendant. By its plea, it sought no affirmative relief, but merely interposed a bar to the relief sought by defendant-in-error. It asked no rescission of the contract. The second plea simply sets out the failure of the defendant-in-error to comply with the con-

tract on his part as a defense to the action. (Record, page 24-5.) This defense could be made as well under the general issue. In actions on contracts, the burden is on the plaintiff to show that he complied with the contract on his part. The complaint or declaration in actions on contracts, to be complete, must aver such compliance. "In an action upon a contract to pay for personal services, performance of the consideration must be alleged, except where such performance was prevented by the act of God or the act of law." (4 Am. & Eng. Encyc. Pleading and Practice 626 c.) "Where the performance of ones duties by the terms of the contract is made a condition precedent, either expressly or by implication, he can only recover by pleading and proving that he has faithfully discharged those duties or that the other party has waived the performance of them." (7 Am. and Eng. Encyc. Law, new edition, Page 145.) The complaint in this cause contains this averment (Record, page 15): "and that he has at all times since the said contract was entered into fully carried out and performed the stipulations on his part to be done and performed." It was necessary for the defendant-in-error to prove this allegation even in the absence of any special plea. The plea of the general issue put it in issue. To prove it, it was necessary for him to show that he had been guilty of no violation of the terms of the contract. One of the implied terms was that he should obey the reasonable orders of the master, and not absent himself from the service of the master. In a general way he was bound to show, to make out his case, that he had violated neither of these implied contractual duties. The plaintiff-in-error similarly had the right to show that defendant-in-error had violated these implied terms of the contract and this without any special plea. Can it be said that the plaintiff-in-error cannot defend by disproving a fact, which is essential to the defendant-in-error's right to recover. In the case at bar, the testimony of the defendant-in-error affirmatively showed that

he had first broken the contract, or at least tended to show that fact. The questions in issue were whether there was a contract, whether defendant-in-error kept the provisions binding on him, and whether the plaintiff-in-error broke those or one of those binding on him. Yet if the contention of the defendant-in-error be conceded, the fact that the proof showed that the defendant-in-error had not kept the contract on his part, is not material and cannot be relied on by plaintiff-in-error as a defense to the suit. In other words the absence of proof of one of the essential elements of defendant-in-error's right of recovery would not prevent him from recovering. Stronger than this, though it was affirmatively shown and that by defendant-in-error's own proof that this essential element not only did not exist, but that the contrary did exist; yet the plaintiff-in-error could not rely on this state of facts as a defense to the suit. The fallacy arises from applying a rule which concerns only the rights of an actor in seeking relief affirmatively, to that of a defendant seeking no relief but merely defending against relief sought by the other party. All the cases cited by counsel for defendant-in-error on his brief, were cases in which a plaintiff was seeking to rescind or set aside a contract and recover what he had parted with in reliance on it, and the rule was applied as against such plaintiff. In no case has the rule ever been applied to a defendant who was seeking no affirmative relief, but merely defending against an action for breach of a contract. In every case where an entire contract of employment is broken by the servant after partial performance, it is clear that it is impossible for the defendant to restore the consideration moving from the plaintiff (that part of the work which has already been performed) yet would anyone contend that because of this impossibility, the defendant, when sued by the plaintiff for a breach of the contract could not reply that the plaintiff himself had first broken the contract. We submit that the rule relied on has no application to the case of a party merely defending against an action for breach of a

contract. The rule is by its terms confined to cases where by reason of some fraudulent inducement at the time of entering into the contract, one party upon afterwards discovering it, is given the right to rescind or set aside the contract and recover what he parted with under it, upon condition that he restore what he received. In the case at bar, no reason for rescinding the contract sued on, arising out of any fraud at the time it was entered into, exists or is contended for by the plaintiff-in-error. It seeks no such redress. It admits the validity of the contract and that it was binding on both parties according to its terms. It does not claim to have been defrauded by defendant-in-error, and does not ask to have the agreement set aside for that reason or any reason. Recognizing the validity of the contract, it simply says to the defendant-in-error, when sued upon it, "You broke it first, and the law says that before you can recover for a breach of the contract, it must appear that you kept it on your part." The plaintiff-in-error filed no special plea of fraud in which he asked the Court to grant him relief by setting aside the contract and restoring the *statu quo*. If it had done this or if it were suing the defendant-in-error for the restoration of the consideration it parted with to the defendant-in-error, there would have been an opportunity for counsel for defendant-in-error to reply that plaintiff-in-error had failed to restore what it got under the contract. Did anyone ever hear that it was a condition imposed on a defendant before defending an action for breach of contract on the ground that plaintiff had first broken it, that he should restore the plaintiff to his *statu quo*. The basis of the rule is that the party seeking the recission has an election to avoid the contract because of fraud, and as a condition of the exercise of this election, he must first restore the defrauding party to his *statu quo*. Has the plaintiff-in-error in this case any election that he is required to exercise before defending the suit, on the ground that defendant-in-error first broke the contract?

The case of Snow vs. Alley, 11 N. E. Rep. 764, relied

on by counsel for defendant-in-error was a suit to recover one hundred thousand dollars worth of bonds, the consideration of an alleged fraudulent agreement, which the plaintiff sought to avoid for the fraud. It was impossible to restore the parties to the contract to the *statu quo*. The Court say: "The rule, as given by most eminent judges, certainly excludes the plaintiff in the case at bar from any right to rescind the contract, or to recover in the *form of action*, he has adopted, the value of the property he has parted with." This is surely not the equivalent of saying that if the plaintiff in that case had been sued for a breach of the same contract, he could not defend by showing that the defendant in that case, had first broken the contract. The rule is expressly limited to cases where a rescission of the contract is sought, and a form of action adapted to that form of relief is brought.

So in the case of Jones vs. Anderson, 82 Ala., 302, cited by counsel for defendant-in-error, the Court say: "When a purchase of property is made by one person from another, by a false pretense, or other like fraud, the party defrauded may elect to rescind the sale within a reasonable time after discovery of the fraud. But there can usually be no rescission, unless both parties can be restored practically to the condition in which they were before the contract was made. This involves the restitution of whatever of value each may have received under the cantract. *Where this can be done*, it must be done, or an offer made to do so, by the party proposing to rescind; unless he shows an excuse for failing to make such offer, as that it would have been fruitless, or for other good reasons." This was an action of detinue to recover the specific property, which the plaintiff had sold the defendant under an alleged fraudulent contract of sale. The distinction between this case and the case at bar is apparent. And even in cases where the rule is held to be applicable, the Court limit the rule to cases where restitution is possible.

IV.

The proper measure of damages.

This was an action for the breach of a contract of employment. The Court below construed the contract to be one for the life of the defendant-in-error on the ground that its duration was the period of his disability, which was permanent. In coming to the question of damages, the Court at the request of the defendant-in-error gave a charge to the effect that the measure of recovery was the amount of the installments of wages with interest which had fallen due up to the time of the trial, without any deductions for what the defendant-in-error might have earned, or what benefit the plaintiff-in-error was deprived of by the loss of his services. This being a contract of employment, the general rule as to the measure of damages for the breach of such contracts applies. That rule is that in an action which treats the contract as completely broken and goes for damages for the breach of it *in solido*, the measure of damage is the loss suffered by the servant up to the time of the trial, deducting therefrom what wages he did or could by the exercise of reasonable diligence have earned in the interim in a similar character of employment. The charge given at defendant-in-error's request (Assignment No. 16, Record Page 53) was erroneous in that ignored and took from the jury all consideration of any deduction to be made for what the jury might have believed the defendant-in-error either did or might have earned during the time from his discharge to the time of the trial. The rule is supported by the weight of authority. It is peculiar to actions for breach of contracts of service or employment and prevails in Alabama where the contract sued on was made as is shown by the unbroken line of authorities from that state cited below.

14 Am. Eng. Encyc. Law, Page 797, Sec. 15 and cases in note.

Davis vs. Ayres, 9 Ala. 293.
Fowler vs. Proutt, 24 Ala. 194.
Strauss vs. Meertief, 64 Ala. 306.
Wilkinsons vs. Black, 80 Ala. 329.
Liddell vs. Chidchester, 84 Ala. 508.
Everson vs. Powers, 89 N. Y. 527.
Sutherland on Damages, Vol. II, Page 472.
Wood Master & Servant, 2nd Ed., Sec. 127, Page 260.
McDaniel vs. Park, 19 Ark. 671.
Rogers vs. Parham, 8 Ga. 190.
McMullen vs. Dickinson, 62 N. W. Rep. 120.
Bassett vs. French, 31 N. Y. S. 667.
Hamilton vs. Love, 43 N. E. 873.
Zender vs. Seliger-Toothill Co., 39 N. Y. S. 346.
Gordon vs. Brewster, 7 Wisconsin 355.
Sutherland vs. Wyer, 67 Me. 64.
Pritchard vs. Martin, 27 Miss 305.
Darst vs. Mathieson Alkali Works, 81 Fed 284.
Pope vs. Lathrop, 46 N. E. 154 (Indiana).
Martin vs. Everett, 11 Ala. 375.

In Wood on Master & Servant, Sec. 127, Page 260, it is said: "And there is no question but that this is the rule in England, but I am aware of no case in this country in which a similar rule has been adopted, but, upon the contrary, the drift of American decisions is opposed to any such rule of recovery, and limits the judgment to the servant's actual loss up to the day of trial."

In Sutherland on Damages, Vol. II, Page 472, the author says on this subject: "The full damages for the term cannot be assessed in advance * * * (Citing from the opinion in a Wisconsin case) Cole J. said: 'In any business the price of labor fluctuates greatly within four years (the contract period in that case) particularly is this true in the lumbering business in this country. Now suppose the respondent could only obtain for his services next year five hundred dollars, and so on, would it not be unjust

to say that he should only recover according to the rule adopted by the jury in this case. Or suppose that the value of his labor should rise so that he could obtain for his services two thousand or twenty-five hundred dollars a year, what then would be his loss for the failure of appellant to fulfil his contract? Still further the difficulty presents itself. Suppose the respondent should die within the four years, or become incapacitated to perform service of any kind, would he be entitled to recover the damages he has recovered? As the case now stands we think he was only entitled to recover his salary on the contract down to the day of trial deducting therefrom any wages which he might have received, or might reasonably have earned in the meantime."

In case of McMullen vs. Dickinson Co., 62 N. W. Rep. 120, is an instructive one. After demonstrating the unsoundness of the former doctrine of constructive service, and as well the injustice of the rule of those courts which, having abandoned the doctrine of constructive service, deny to the discharged servant any recovery except in an action for damages for breach of the contract, recoverable *in solido*, the Supreme Court of Minnesota, say: "No one action to recover all the damages for such a breach of contract can furnish any adequate remedy, or do anything like substantial justice between the parties. By its charter the life of this corporation is thirty years. If the action is commenced immediately after the breach, how can prospective damages be assessed for this thirty years, or for even one year? To presume that the discharged servant will not be able for a large part of that time to obtain other employment and award him large damages, might be grossly unjust to the defendant. Again, the servant is entitled to actual indemnity, not to such speculative indemnity, as must necessarily be given by awarding him prospective damages. His contract was not a speculative one and the law should not make it such." And again: "The fallacy lies in assuming that on the breach of the contract,

loss of wages is analogous to loss of profits, and that the same rule of damages applies, while in fact the cases are wholly dissimilar, and there is scarcely a parallel between them. In the one case the liability is absolute, in the other, it is contingent. * * * In the one case, the liability is a contingent liability for loss of wages, in the other case it is an absolute liability for loss of profits. Such contingent liability cannot be ascertained in advance of the happening of the contingency, and that is why prospective damages for loss of wages are too contingent and are too speculative and uncertain to be allowed, while retrospective damages for such loss are of the most certain character. On the other hand, if damages for loss of profits are too speculative and uncertain to be allowed, they are equally so whether prospective or retrospective." And again: "It is our opinion that the servant wrongfully discharged is entitled to indemnity for loss of wages, and for the full measure of this indemnity the master is clearly liable. The liability accrues by installments on successive contingencies. Each contingency consists in the failure of the servant without his fault to earn during the installment period named in the contract, the amount of wages which he would have earned if the contract had been performed, and the master is liable for the deficiency. * * * The original breach is not total, but the failure to pay the successive installments constitutes successive breaches. Since the days of Lord Ellenborough, this class of cases has been in some courts an exception to the rule that there can be but one action for damages for the breach of a contract, and there are strong reasons why it should be an exception. Because the discharged servant may, if he so elect, bring successive actions for the installments of indemnity as they accrue, it does not follow that he cannot elect to consider the breach total, and bring one action for all his damages, and recover all the same accruing up to the time of trial."

The rule laid down in the cases and text books cited ap-

plies generally to contracts for service. The only difference in the facts of the cases is that the duration of the employment is for months or years, instead of for life, in those cases. The reason of the rule applies with still greater force to contracts of service for life than for a term of years or months. The reason of the rule is that all damages beyond the time of trial, that may be allowed, are purely speculative. The plaintiff immediately after the trial might obtain employment at a greater compensation than he would have been entitled to had the contract remained unbroken. If he is not satisfied to accept in full of his damages what amount he has suffered up to the time of the trial he has an election to treat the contract as subsisting, and sue for each month's installment as it becomes due. In this way, he can recover all he could ever be entitled to, had the contract remained unbroken, and in the manner and times as provided for by the contract. In a contract for life the duration of the contract depends upon the uncertainties of life, and the plaintiff-in-error should not be made to pay for those uncertainties in the way of damages which are purely speculative. The defendant-in-error having the right to elect as to the form of his remedy, so that he can fully protect himself, and still impose no hardship on the plaintiff-in-error, by bringing an action for each installment as it falls due or a number of past due installments in the same action, ought not to be allowed by electing to bring one action for all his damages immediately upon the breach of the contract, to impose on the plaintiff-in-error who has no choice in the matter, the risk of paying damages, which the future may show the defendant-in-error would never have suffered, had the contract remained unbroken. The defendant-in-error in this case may die the day succeeding the final trial, and after he has recovered damages for the period of a number of years subsequent to his death. This risk the plaintiff-in-error should not be made to assume since the law allows the defendant-in-error to protect himself from suffering any loss by instituting each month an

action for the amount due for the preceding month, and allows the plaintiff-in-error no option as to the form of suit. There is an obvious reason why the rule that applies in cases of actions for causing the wrongful death of a decedent should not apply to cases of actions for breaches of contracts of employment, since in the former there is no possible way of determining how long the decedent would have lived but for the wrongful act, and the plaintiff in such suits has no election, but must recover all his damages at once, or not at all. The necessity of the case justifies a rule which frequently works great hardship on defendants. No such necessity exists in such cases as the case at bar, and when the necessity ceases, the rule itself should cease. There is no difference in effect between the contract in this case, and an ordinary contract for service, and the rule applies generally to all contracts for service, whatever their term or duration may be, that the recovery of damages is limited to those which are determinable without resort to speculation, i. e., those which have accrued up to the time of the trial. Nor can the fact that in this case, a release of defendant-in-error's cause of action formed part of the consideration for the employment affect the rule. The defendant-in-error, by bringing an action for successive installments as they fall due, has it in his power to get just what the contract provided he was to get. So while his cause of action for his injury cannot be restored to him, he still has the right under the law to get exactly what he parted with his cause of action for. Having this right, and declining to pursue it, we submit that he should not be allowed to speculate on damages which the event might show he would never have suffered.

The Court below, by giving to the jury the charge requested by defendant-in-error (Assignment 16) withdrew from the consideration of the jury the question of deducting from the amount due on the face of the contract, what the jury might find from the evidence, defendant-in-error

did in fact or might have earned after his discharge and up to the time of the trial. This was error.

The defendant-in-error testifies: "The only work I have ever done on it (the land he bought at Cowles Station after his discharge) is to put out some fertilizer and superintend the work on the farm." Record Page 35. From this testimony the jury had the right to infer that he actually did work of value, which should be deducted.

Regarding his ability to work after he was hurt, defendant-in-error, testifies: "I ran the compressor at the mines for over a year after I got well after I was hurt." Record Page 35.

Regarding this same matter, witness Dr. R. M. Cunningham testifies: "I think the plaintiff can run a stationary or locomotive engine in his present condition." Record Page 41.

In regard to this same matter, witness W. L. Rogers testifies: "The plaintiff had charge of the compressor. He ran it and greased it, and looked after it just as any other man would do. Sixty or sixty-five dollars would be a reasonable value for the work he did in running the compressor. He ran it and kept it up for a year or a year and a half, as well as anyone could do." Record Page 43.

Thus the record discloses evidence tending to show that defendant-in-error after his discharge actually performed labor of value on his farm, for which the jury were given no right by the Court to make allowance; and also that he was physically able after his discharge and up to the time of the trial to run a stationary or locomotive engine (labor of the same character as he had been engaged in before his discharge, and which he was bound to seek after his discharge, if able to perform it). The only reason he assigned in his testimony for not seeking it was that he was physically disabled from performing it. The legitimacy of this excuse was, under the evidence in the record, a question for the jury. The evidence tended to show that the reasonable value of services such as he was required to seek, if able,

was $60.00 or $65.00 a month. The question of deduction for the value of such service should have been left to the jury, and the Court erred in directing the jury to find for defendant-in-error the full amount due by the contract, irrespective of such deduction.

Counsel for defendant-in-error insist that no deduction should be made from the amount of wages due the defendant-in-error for what he might have earned or did earn during the period of the contract for which a recovery was had. They deny the right to deduct for two reasons.

First, because the defendant-in-error, as they contend, was so disabled that he could do no work. We submit that this was purely a question of fact for the jury.

Second, because they say the contract of employment was incidental and collateral to the release, which, as they contend, was the main subject matter of the contract. The case of Frazier vs. E. T. V. & G. R. R. Co., 12 S. W. Rep. 537, relied on in support of this point, is distinguishable from the case at bar, for the reason that the terms of the contract in the two cases were unlike The Court, through Justice Lurton, say of the contract in the Frazier case: "He, on his part, agreed to do such work in the shops of the company as he should be called upon to do, and which he might be physically able to do. If any question should arise as to his ability, then it was agreed that Dr. Deadrick should settle such question, and if he should decide that complainant was able to do the work required, then his payments should be abated for the time lost." Of this contract the Court says that it was a contract for a settlement of personal injuries, and that the amounts paid by the railroad company were payments on that settlement, and that the labor provided for by the injured man was merely incidental, and that the value of his time should not be deducted from the verdict. The Court say: "The agreement that he should, if able, render services in their shops, if called upon, was a mere incident of the settlement, and the sums agreed to be paid him are not for work and labor,

but are agreed payments in liquidation of damages, to be reduced by the value to them of his services to them in their shops, if he should ever be called upon to so labor, and should be physically able. This demand is therefore one for personal injuries. We think it was error to abate his claim by the value of his labor in his own store. *He was never called upon to perform any labor for defendant*, and was unable, if he had been, to have rendered service in their shops for any considerable part of the time. His time and labor belonged to himself unless he was able to work in their shops, and wrongfully refused to so work when called." In the Frazier case the plaintiff was not, by his contract, obligated to give his labor to defendant until called upon to do so. Up to the time of the trial, he had not been called upon to perform any labor for defendant. In the case at bar, the contract recognizes not only the present and immediate obligation on the part of defendant-in-error to work for plaintiff-in-error, but also the fact that he was then working for plaintiff-in-error, and the contract purports on its face to have been made for the purpose of regulating the terms of that service. Instead of the service to be performed being merely incidental to the main purpose it is clearly in the contract in the case at bar, the principal subject matter of the contract. Defendant-in-error having resumed work, its purpose was to fix the terms of the service. In the Frazier case the Court held that the defendant had no right to the plaintiff's time until he was able to work in defendant's shop, and until the defendant called on him to do so. Neither of these contingencies having arisen before the trial, the contract of service had not then come into effectiveness, and as by its terms the defendant was only entitled to the value of plaintiff's time in the event of those contingencies, the defendant, as a matter of course, had no right to claim any deduction for what plaintiff earned in his own store. Until called upon to work for defendant, by the express terms of his agreement, his time belonged to himself alone. In the

case at bar, from the time of the execution of the contract sued on, the defendant-in-error's time belonged to the plaintifl-in-error by the very terms of the contract. The contract recited that defendant-in-error had resumed work, and was to do such work as he had been doing and was able to do, for the stipulated compensation. The difference is that in one case the railroad company defendant was not entitled to the injured man's services either because of his disability to perform them or because he has not been called upon to perform them, while in this case the plaintiff-in-error was entitled to them.

MISCELLANEOUS ASSIGNMENTS.

The fourth and fifth and thirteenth and fourteenth assignments of error are based on exceptions to the exclusion of testimony as to the terms of the first and second oral agreements, mentioned by way of recital in the written agreement sued on. (Record, pages 36, 37 and 44.) These agreements were both originally in parol. The mere recital of them in the written contract did not make that written contract the best evidence of the agreements. The written contract is to be interpreted in connection with the previous contracts. The trial judge held that the three contracts were simply one continuous negotiation, consummated in the final written agreement with release of defendant-in-error's cause of action. Proof of the terms of the first and second agreements were material to the proper construction of the last and written agreement. The offer was to show that in neither verbal contract did Pierce release his cause of action for personal injury. (Record, page 37). The exclusion of this testimony was for that reason erroneous.

The twenty-fourth assignment of error was predicated on the refusal of this charge: "If the jury believe from the evidence in this case that Pierce, at the time he was discharged by defendant, was no longer disabled within

the contemplation of the contract sued upon, then the jury must find a verdict for the defendant." The period of the contract was either indefinite and indeterminate or determinable at the will of the parties or it was during disability. Disability is not synonymous with permanent injury. It means disability to work. Whether defendant-in-error, at the time of his discharge was able to work, was a question for the jury. If the jury believe from the evidence that he was not so disabled, then the contract was terminable at the will of the plaintiff-in-error and it was guilty of no violation of the contract in summarily determining it.

Respectfully submitted,

Walker Percy,
Wm. F. Gubb,

Frank H. Pierce, Plaintiff-in-Error,

vs.

Tennessee Coal, Iron & Railroad Co., Defendant-in-Error.

BRIEF OF COUNSEL FOR DEFENDANT-IN-ERROR ON THE WRIT OF ERROR SUED OUT BY FRANK H. PIERCE.

The first error assigned by Frank H. Pierce is based upon the exclusion of testimony in relation to the age, health, habits of life, and expectancy of life of plaintiff-in-error. If the Court properly charged as to the measure of damages this testimony was properly excluded. The proper measure of damage has been fully discussed in our brief on the writ of error of the Tennessee Coal, Iron & Railroad Company, and we can add nothing to what was there said.

Plaintiff-in-error's bill of exceptions (Record Pages 61-2-3) fails to disclose any exception as the basis of the second assignment of error.

Conceding that the measure of damage to be as contended for by plaintiff-in-error, the refused written charge No. 1, which is the basis of the third assignment of error was rightfully refused because its effect is to charge that plaintiff-in-error was entitled to recover as a matter of law on the merits of the case. The defendant-in-error, under the testimony was entitled to go to the jury on the issue of the rightfulness of the discharge of plaintiff-in-error, and on the issue presented by defendant-in-error's plea of recoupment. The like reason justifies the refusal of charge No. 2 which is the basis of plaintiff-in-error's fourth assignment of error, (Record page 66) regardless of its correctness on the question of damages.

We submit that the plaintiff-in-error can take nothing from his exceptions to the rulings of the Court on the ques-

tion of the measure of damages for the additional reason that he requested in writing a charge (Record, page 46) embodying the measure of damages as given to the jury by the Court. This was an express acquiescence in the Court's charge on the question of damages, and a waiver of the exception to the exclusion of the testimony set out in the first assignment of error and to the charges refused at his request. The record shows (page 46(that counsel for plaintiff-in-error prepared a written charge and handed it to the Court to be read to the jury, which was read to the jury by the Court, and which charged that there could be no recovery of damages beyond the time of the trial. No exception was reserved to the giving of this charge by plaintiff-in-error, and the Court had the right to presume that the charge was acquiesced in and consented to by counsel for plaintiff-in-error. This failure to except was a consent that the rule of damages therein set out should be the law of the case and estopped plaintiff-in-error from relying on the assignments raising that question.

Long vs. Fox, 100 Ill. 50.
Badgett vs. Johnson Fife Hat Co., 29 U. S. Circuit Court App. 233.
Noble vs. Blount, 77 Mo. 241.
Fairbanks vs. Long, 4 S. W. 499.
Walton vs. Railway Co., 6 U. S. C. C. A. 223.
Nitche vs. Earle, 19 N. E. 749
Downing vs. West, 66 Ill. 367.
Price vs. Town of Breckenridge, 5 S.W. 20.

Respectfully submitted.

Walker Perry
Wm. Goudy

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1898.

PIERCE *v.* TENNESSEE COAL, IRON AND RAILROAD COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 174. Argued and submitted January 19, 20, 1899. — Decided February 20, 1899.

An agreement in writing between a mining company and a machinist stated that while in its employ he was seriously hurt under circumstances which he claimed, and it denied, made it liable to him in damages; that six months after the injury, both parties being desirous of settling his claim for damages, the company agreed to pay him regular wages and to furnish him with certain supplies while he was disabled, and carried out that agreement for six months, at the end of which, after he had resumed work, it was agreed that the company should give him such work as he could do, and pay him wages as before his injury, and this agreement was kept by both parties for a year; and then, in lieu of the previous agreements, a new agreement was made that his wages "from this date" should be a certain sum monthly, and he should receive certain supplies, and he on his part released the company from all liability for his injury, and agreed that this should be a full settlement of all his claims against the company. *Held*, that the last agreement was not terminable at the end of any month at the pleasure of the company, but bound it to pay him the wages stipulated, and to furnish him the supplies agreed, so long as his disability to do full work continued; and that, if the company discharged him from its service without cause, he was entitled to

Statement of the Case.

elect to treat the contract as absolutely and finally broken by the company, and, in an action against it upon the contract, to introduce evidence of his age, health and expectancy of life, and, if his disability was permanent, to recover the full value of the contract to him at the time of the breach, including all that he would have received in the future as well as in the past if the contract had been kept, deducting however any sum that he might have earned already or might thereafter earn, as well as the amount of any loss that the defendant sustained by the loss of his services without its fault.

This was an action brought January 22, 1892, in the circuit court of Jefferson County in the State of Alabama, by Frank H. Pierce, a citizen of the State of Alabama, against the Tennessee Coal, Iron and Railroad Company, a corporation of the State of Tennessee, doing business in the State of Alabama, upon a written contract, signed by the parties, and in the following terms:

"Pratt Mines, Ala. 4th June, 1890. Whereas I, F. H. Pierce, while in the employ of the Tennessee Iron, Coal and Railroad Company, Pratt Mines Division, as a machinist, was seriously hurt by a trip of tram cars on the main slope of the mine known as Slope No. 2, and operated by the Tennessee Coal, Iron and Railroad Company, under circumstances which I claim render the said company liable to me for damages; but whereas they disclaim any liability for said accident or the injuries to me resulting from same; and both parties being desirous of settling and compromising said matter; and whereas the said Tennessee Coal, Iron and Railroad Company did make me a proposition on the —— day of November, 1888, said accident having occurred on the 21st day of May, 1888, that they would furnish me such supplies from the commissary at No. 2 prison, as I might choose to take, pay me regular wages while I was disabled, and give me my coal and wood for fuel at my dwelling, and the benefit of the convict garden at No. 2; and whereas said proposition was accepted by me, and carried out by the said company; and whereas in May, 1889, after I had resumed work, a further proposition was made to me to give me work, such as I could do, paying me therefor the wages paid me before said accident, that is, $60 per month, and in addition free house rent, [or in lieu of

house rent a certain amount of supplies from the convict commissary at No. 2 prison, which supplies were to amount to about the sum paid by me for house rent;] and whereas said agreement has been faithfully kept by both parties; and whereas on the 4th day of June, 1890, it is mutually agreed between myself and the said company that it will be better to give me the house rent than the supplies of about equal amount from the commissary; now therefore it is agreed, in view of the above propositions, which have been faithfully carried out, that my wages from this date are to be $65 a month, and in addition I am to have, free of charge, my coal and wood necessary for my household use at my dwelling, and the same benefit from the garden as is had by others who are allowed the garden privilege; and I on my part agree and bind myself to release the said company from any and all liability for said accident, or from the injuries resulting to me from it or from the effects of it, and agree that this is to be a full and satisfactory settlement of any and all claims which I might have against said company."

The complaint set out the contract, except the clause above printed in brackets; and alleged that by this contract the defendant became liable to pay the plaintiff monthly during his life the wages therein stipulated, and to furnish him with coal and wood and allow him the privilege of the garden, as therein agreed; that the plaintiff had always been ready and offered to do for the defendant such work given to him as he was able to do, and had labored at the same for such reasonable time as he was able to work and bound to work under this contract; that by the injuries received by him from the accident mentioned therein he was permanently disabled in the use of his legs and hands, and otherwise so injured as to be incapacitated to do more work than he had done and had offered to do; but that the defendant, without any reasonable ground for so doing, abandoned the contract and refused to carry it out, claiming that the defendant was under no obligation to pay to the plaintiff the wages therein stipulated longer than suited its pleasure; and had wholly and purposely disregarded and refused to abide by the obligations of the contract

for the period of six months next before the commencemer of the suit, and had entirely abandoned the contract and di charged the plaintiff from its service. The plaintiff claime damages, in the sum of $50,000, for the defendant's breac and abandonment of the contract.

The defendant demurred to the complaint, upon the groun that the contract set out therein was one of hiring, terminabl at the will of either party, and not one of hiring for life, a alleged in the complaint; and that it appeared, from the obl gations of the complaint, that the defendant, in terminatin the contract of hiring, had only exercised its legal right unde the contract. The court sustained the demurrer, and, th plaintiff declining to amend his complaint, rendered judgmen for the defendant; and the plaintiff on February 21, 1894, ap pealed from that judgment to the Supreme Court of Alabama

The record transmitted to this court does not show any fu ther proceedings in the Supreme Court of Alabama. But th official reports of its decisions show that at November term 1895, it reversed that judgment, and remanded the case to th county court. *Pierce* v. *Tennessee Coal Co.*, 110 Alabama 533. And the record before this court necessarily implie that fact, by setting forth that in March, 1896, on motion o the defendant, suggesting that from prejudice and local influ ence it would not be able to obtain justice in the state courts the case was removed from the county court into the Circui Court of the United States for the Southern Division of th Northern District of Alabama; and a motion to remand th case to the state court was made by the plaintiff (on wha ground did not appear in the record) and was overruled.

In the Circuit Court of the United States, on January 4 1897, the following proceedings took place: The demurrer t the complaint was renewed by the defendant, and overrule by the court. The plaintiff then amended his complaint b inserting, in the copy of the contract set forth therein, th words above printed in brackets; and a demurrer to th amended complaint was filed and overruled. In answer t this complaint the defendant filed two pleas: 1st. A denia of each and every allegation of the complaint; 2d. "The de

fendant, for further answer to the complaint, says that the plaintiff, under and by the terms of the contract set out in the complaint, contracted to perform for the defendant during the term thereof such service as he was able to perform, in consideration for the promises made by the defendant therein; and the defendant avers that the plaintiff thereafter became able to perform service for the defendant, and did in fact perform such service for some time thereafter, and that, while engaged in the performance of such service, the plaintiff voluntarily and without excuse therefor refused to further perform such service as he was able to perform and was in fact performing for the defendant, as required by said contract, and the defendant thereupon discharged the plaintiff from its service; and the defendant avers that the plaintiff failed to comply with the conditions imposed upon him by said contract." The plaintiff joined issue on the first plea; and demurred to the second plea, upon the ground that it did not go to the whole consideration of the contract, and was no answer to the entire action; and the court sustained his demurrer. The defendant, for further answer, and by way of recoupment, pleaded that on May 3, 1891, the plaintiff, voluntarily and without excuse, refused to perform such labor as he was able to perform and was in fact performing for the defendant, as required by the contract; and since that time had continued to refuse to perform and had not in fact performed such service, or any part thereof; to the damage of the defendant in the sum of $50,000.

A bill of exceptions, tendered by the plaintiff and allowed by the court, showed that at the trial before the jury the following proceedings were had:

The plaintiff introduced and read in evidence the contract sued on, and introduced evidence tending to prove the allegations of the complaint. He also offered evidence that, at the time of his discharge by the defendant from its employment in May, 1891, he was fifty-five years of age, and that he was then and had since been in good health, and addicted to no habits of drinking or otherwise, affecting his health and expectancy of life; and introduced the American tables of mortality

used by insurance companies, showing his expectancy of life at the time of his discharge, and at the time of the trial.

But the court ruled that no recovery could be allowed on the contract, beyond the instalments of wages due and in default up to the date of the trial; and, upon the defendant's motion, excluded all evidence of the plaintiff's age, health and expectancy of life, "on the ground that it was immaterial and irrelevant, and because damages for the expectancy of life was a matter too vague and uncertain to be allowed."

The plaintiff duly excepted to the ruling and to the exclusion of evidence; and, to present the same point, asked the court to give, and duly excepted to its refusal to give, the following instruction to the jury: "If the defendant, after making the contract sued on, and before the suit, refused further to pay the plaintiff and to furnish the articles stipulated to be furnished, and refused to employ the plaintiff, and discharged him, the plaintiff is entitled to the full benefit of his contract, which is the present value of the money agreed to be paid and the articles to be furnished under the contract for the period of his life, if his disability is permanent, less such sum as the jury may find the plaintiff may be able to earn in the future, and may have been able heretofore to earn, and less such loss as the defendant may have sustained from the loss of the plaintiff's service without the defendant's fault."

The defendant also tendered and was allowed a bill of exceptions, presenting substantially, though in different form, the questions involved in the plaintiff's case, and the contents of which therefore need not be particularly stated.

The jury returned a verdict for the plaintiff in the sum of $5893, upon which judgment was rendered. Each party sued out a writ of error from the Circuit Court of Appeals for the Fifth Circuit.

That court was of opinion that the contract sued on was for "an employment by the month, and therefore, like every other such employment, subject to be discontinued, at the will of either party, at the expiration of any month, or at any time for adequate cause;" and consequently that there was error

in overruling the demurrer to the complaint; and upon that ground, without passing upon any other question in the case, reversed the judgment of the Circuit Court of the United States, and remanded the case to that court for further proceedings, Judge Pardee dissenting. 52 U. S. App. 355, 365. The plaintiff thereupon applied for and obtained a writ of certiorari from this court. 168 U. S. 709.

Mr. Walker Percy for the Tennessee Coal, Iron and Railroad Company. *Mr. William I. Grubb* was on his brief.

Mr. W. A. Gunter, for Pierce, submitted on his brief.

Mr. Justice Gray, after stating the case as above, delivered the opinion of the court.

In the Circuit Court of the United States, a verdict and judgment were rendered for the plaintiff for a less amount of damages than he claimed; and each party alleged exceptions to rulings and instructions of the judge, and sued out a writ of error from the Circuit Court of Appeals. That court held that the defendant's demurrer to the complaint should have been sustained, and therefore reversed the judgment of the Circuit Court, and remanded the case for further proceedings. A writ of certiorari to review the judgment of the Circuit Court of Appeals was thereupon applied for by the plaintiff, and was granted by this court.

The fundamental question in this case is whether the contract in suit, made by the parties on June 4, 1890, is a contract intended to last during the plaintiff's life, or is a mere contract of hiring from month to month, terminable at the pleasure of either party at the end of any month.

The facts bearing upon this question, as appearing upon the face of this contract, are as follows: In May, 1888, the plaintiff, while employed as a machinist in the defendant's coal mine in Alabama, was seriously hurt by a trip of tram cars on the main slope of the mine, under circumstances which the plaintiff claimed, and the defendant denied, rendered it liable to him in damages. The parties were desirous of settling and

compromising the plaintiff's claim for damages for the injuries, and had repeated negotiations with that object. In November, 1888, they made an agreement (which does not appear to have been reduced to writing) by which the defendant was to pay the plaintiff regular wages while he was disabled, and also to furnish him with such supplies as he might choose to get from a commissary, and to give him coal and wood for fuel at his dwelling house, and the benefit of a garden belonging to the defendant. The agreement was carried out by the defendant until May, 1889, and was then, after the plaintiff had resumed work, modified by stipulating that the defendant should give the plaintiff such work as he could do, should pay him therefor wages of $60 a month, as before the accident, and should give him the rent of his house, or, in lieu of house rent, an equivalent amount of supplies from the commissary; and the agreement, as so modified, was faithfully kept by both parties until June 4, 1890. Finally, on that day, the parties entered into the written contract sued on, by which, after reciting the plaintiff's claim for damages and the earlier agreements, it was agreed "in view [evidently a misprint for "in lieu"] of the above propositions, which have been faithfully carried out," that the plaintiff's "wages from this date are to be $65 a month," (the increase of wages being apparently intended as an equivalent for the provision, now omitted, for house rent or supplies from the commissary,) and that he was to have, free of charge, his fuel and the benefit of the garden; and the plaintiff, on his part, agreed to release the defendant from any and all liability for the accident, or for the injuries resulting to him from it or from the effects of it, and that this should be a full and satisfactory settlement of all claims which he might have against the defendant.

The effect of the provisions and recitals of the contract sued on may be summed up thus: The successive agreements between the parties were all made with a view to settle and compromise the plaintiff's claim against the defendant for personal injuries, caused to him by the defendant's cars while he was in its service as a machinist, and seriously impairing his ability to work. By each agreement, the defendant was

to pay him certain wages, and to furnish him with certain supplies. The supplies to be furnished were evidently a minor consideration, and require no particular discussion. The more important matter is the wages. The defendant, at first, agreed to pay the plaintiff "regular wages while he was disabled." The agreement, in that form, would clearly last so long as he continued to be disabled, and could not have been put an end to by the defendant without the plaintiff's consent. By the next succeeding agreement, made after the plaintiff had resumed work, the defendant was "to give him work, such as he could do, paying him therefor the wages paid before said accident, that is, $60 a month." That agreement must be considered as a mere modification of the first, requiring the plaintiff to do such work as he could do, but showing that he was still much disabled by his injuries. By the final agreement in writing of June 4, 1890, after reciting the plaintiff's claim for damages for these injuries, as well as the earlier agreements, his wages were increased by a stipulation that his "wages from this date are to be $65 a month," and he expressly released the defendant from all liability for the injuries resulting to him from the accident or from the effects thereof, and agreed that this should be a full and satisfactory settlement of all his claims against the defendant.

The only reasonable interpretation of this contract is that the defendant promised to pay the plaintiff wages at the rate of $65 a month, and to allow him his fuel and the benefit of the garden so long as his disability to do full work continued; and that, in consideration of these promises of the defendant, the plaintiff agreed to do such work as he could, and to release the defendant from all liability upon his claim for damages for his personal injuries. An intention of the parties that, while the plaintiff absolutely released the defendant from that claim, the defendant might at its own will and pleasure cease to perform all the obligations which were the consideration of that release, finds no support in the terms of the contract, and is too unlikely to be presumed. *Carnig* v. *Carr*, 167 Mass. 544, 547.

The Supreme Court of Alabama, when the case at bar was before it on appeal from the county court, and before the removal of the case into the Circuit Court of the United States, expressed the opinion that "the contract is sufficiently definite as to time, and bound the defendant to its performance, so long as the plaintiff should be disabled by reason of the injuries he received, which, under the averment that he was permanently disabled, will be for life;" and upon that ground reversed the judgment of the county court sustaining the demurrer to the complaint, and remanded the case to that court. 110 Alabama, 533, 536. As we concur in that opinion, it is unnecessary to consider how far it should be considered as binding upon us in this case. See *Williams* v. *Conger*, 125 U. S. 397, 418; *Gardner* v. *Michigan Central Railroad*, 150 U. S. 349; *Great Western Tel. Co.* v. *Burnham*, 162 U. S. 339, 344, and cases cited; *Moulton* v. *Reid*, 54 Alabama, 320.

It follows that the judgment of the United States Circuit Court of Appeals in this case was erroneous, and must be reversed.

It appears to us to be equally clear that the Circuit Court of the United States erred in excluding the evidence offered by the plaintiff, in restricting his damages to the wages due and unpaid at the time of the trial, and in declining to instruct the jury as he requested.

Upon this point, the authorities are somewhat conflicting; and there is little to be found in the decisions of this court, having any bearing upon it, beyond the affirmance of the general propositions that "in an action for a personal injury the plaintiff is entitled to recover compensation, so far as it is susceptible of an estimate in money, for the loss and damage caused to him by the defendant's negligence, including not only expenses incurred for medical attendance, and a reasonable sum for his pain and suffering, but also a fair recompense for the loss of what he would otherwise have earned in his trade or profession, and has been deprived of the capacity of earning, by the wrongful act of the defendant," and, "in order to assist the jury in making such an estimate, standard life and annuity tables, showing at any age the

probable duration of life, and the present value of a life annuity, are competent evidence;" *Vicksburg &c. Railroad* v. *Putnam*, 118 U. S. 545, 554; and that in an action for breach of contract "the amount which would have been received, if the contract had been kept, is the measure of damages if the contract is broken." *Benjamin* v. *Hilliard*, 23 How. 149, 167.

But the recent tendency of judicial decisions in this country, in actions of contract, as well as in actions of tort, has been towards allowing entire damages to be recovered, once for all, in a single action, and thus avoiding the embarrassment and annoyance of repeated litigation. This especially appears by well considered opinions in cases of agreements to furnish support or to pay wages, a few only of which need be referred to.

In *Parker* v. *Russell*, 133 Mass. 74, the declaration alleged that, in consideration of a conveyance by the plaintiff to the defendant of certain real estate, the defendant agreed to support him during his natural life; and that the defendant accepted the conveyance, and occupied the real estate, but neglected and refused to perform the agreement. The plaintiff proved the contract; and introduced evidence that the defendant did support him in the defendant's house for five years, and until the house was destroyed by fire, and had since furnished him no aid or support. The jury were instructed that "if the defendant, for a period of about two years, neglected to furnish aid or support to the plaintiff, without any fault of the plaintiff, the plaintiff might treat the contract as at an end, and recover damages for the breach of the contract as a whole; and that the plaintiff would be entitled to recover compensation for the past failure of the defendant to furnish him aid and support, and full indemnity for his future support." Exceptions taken by the defendant to this instruction were overruled by the Supreme Judicial Court of Massachusetts. Mr. Justice Field, in delivering judgment, said: "In an action for the breach of a contract to support the plaintiff during his life, if the contract is regarded as still subsisting, the damages are assessed up to the

date of the writ, and not up to the time when the verdict is rendered. But if the breach has been such that the plaintiff has the right to treat the contract as absolutely and finally broken by the defendant, and he so elects to treat it, the damages are assessed as of a total breach of an entire contract. Such damages are not special or prospective damages, but are the damages naturally resulting from a total breach of the contract, and are suffered when the contract is broken, and are assessed as of that time. From the nature of the contract, they include damages for not performing the contract in the future, as well as in the past. The value of the contract to the plaintiff at the time it is broken may be somewhat indefinite, because the duration of the life of the plaintiff is uncertain; but uncertainty in the duration of a life has not, since the adoption of life tables, been regarded as a reason why full relief in damages should not be afforded for a failure to perform a contract which by its terms was to continue during life. When the defendant, for example, absolutely refuses to perform such a contract, after the time for entering upon the performance has begun, it would be a great hardship to compel the plaintiff to be ready, at all times during his life, to be supported by the defendant, if the defendant should at any time change his mind; and to hold that he must resort to successive actions from time to time to obtain his damages piecemeal, or else leave them to be recovered as an entirety by his personal representatives after his death. *Daniels* v. *Newton*, 114 Mass. 530, decides that an absolute refusal to perform a contract, before the performance is due by the terms of the contract, is not a present breach of the contract for which any action can be maintained; but it does not decide that an absolute refusal to perform a contract, after the time and under the conditions in which the plaintiff is entitled to require performance, is not a breach of the contract, even although the contract is by its terms to continue in the future." 133 Mass. 75, 76. It is proper to remark that the point decided in *Daniels* v. *Newton* was left open in *Dingley* v. *Oler*, 117 U. S. 490, 503, and has never been brought into judgment in this court.

So in *Schell* v. *Plumb*, 55 N. Y. 592, the action was by a woman, for a breach of an oral contract, by which the defendant's testator agreed to support the plaintiff during her life, and she agreed to render what services she could towards paying for her support. The contract was carried out for some years; and the defendant then turned her away, and refused to support her. At the trial the judge, against the defendant's objection, admitted in evidence the Northampton tables of life annuities, to show the probabilities of life at the plaintiff's age; and instructed the jury that, if the plaintiff was turned out in violation of the contract, without any misconduct on her part, she was entitled to recover damages from the breach of the contract to the time of trial, deducting what wages she might have earned during that time; and also to recover for her future support and maintenance, as to which the jury were instructed as follows: "Your verdict is all she can ever recover, no matter how long she may live. That ends the contract between these parties; and you will decide, considering her age, her health, her condition in life, and the circumstances under which she is placed, how long she will probably live, and how much services she can probably perform in the future, and say how much more it will cost her to support herself than she will be able to earn, and allow her to recover for such sum." The verdict was for the plaintiff, and judgment was rendered thereon. The defendant appealed, contending that, if the plaintiff was entitled to recover at all, she could only recover for the time prior to the commencement of the action, or, at most, to the time of trial; and that, as to the future, it was impossible to ascertain the damages, as the duration of life was uncertain, and a further uncertainty arose from the future physical condition of the person. But the Court of Appeals, in an opinion delivered by Judge Grover, affirmed the judgment, saying: "Here the contract of the testator was to support the plaintiff during her life. That was a continuing contract during that period; but the contract was entire, and a total breach put an end to it, and gave the plaintiff a right to recover an equivalent in damages, which equivalent was the present value of her contract." "It may be

further remarked that in actions for personal injuries the constant practice is to allow a recovery for such prospective damages as the jury are satisfied the party will sustain, notwithstanding the uncertainty of the duration of his life and other contingencies which may possibly affect the amount." 55 N. Y. 597, 598. See also *Remelee* v. *Hall*, 31 Vermont, 582; *Sutherland* v. *Wyer*, 67 Maine, 64.

In *Eastern Tennessee &c. Railroad* v. *Staub*, 7 Lea, 397, the facts were singularly like those in the case at bar. The plaintiff, having, while in the employ of the defendant railroad company as an engineer, and in the discharge of his duties as such, received serious injuries by a collision between his locomotive engine and another train, and having brought an action to recover damages for those injuries, an agreement, by way of compromise, was entered into, by which, in consideration of the plaintiff's agreeing to dismiss his suit, the defendant agreed to pay the costs thereof and the plaintiff's attorney's fee and physician's bills; and further agreed to retain him in its employ, the plaintiff working when, in his own opinion, he was able to do so, and performing only such services as in his disabled condition he might be able to perform; the defendant agreed to pay him a certain specified sum per day, regular wages paid to machinists, whether he labored or not; and the contract was to continue as long as the injuries should last. For some time after this agreement, the plaintiff continued, at intervals, to perform light work for the defendant, receiving pay, however, only for the time he actually worked; and the defendant then denied any liability under the agreement, and refused to allow the plaintiff to continue the service under it. The Supreme Court of Tennessee held that the plaintiff was entitled to recover in one action the entire damages, not only for wages already due and unpaid, but also damages to the extent of the benefit that he would probably have realized under the contract; and, speaking by Judge McFarland, said: "It is a mistake to suppose, as has been done in argument, that because, in estimating the damages, we look to the probable course of events after the suit is brought, we are therefore allowing damages that accrue after the action is

brought. The right to recover damages accrues upon the breach of the contract. But the rule of damages in such cases is what would have come to the plaintiff under the contract had it continued, less whatever the plaintiff might earn by the exercise of reasonable and proper diligence on his part; and, of course, in ascertaining this, we must look to a time subsequent to the breach, and in some cases to a time subsequent to the bringing of the suit. Nor is it any objection to the recovery, that in this case the damages are difficult to ascertain, depending upon contingent and uncertain events. There are many cases in which the damages are uncertain and difficult to ascertain, and, in fact, cannot be ascertained with certainty, but this has never been regarded as a sufficient reason for denying all relief." 7 Lea, 406.

These cases appear to this court to rest upon sound principles, and to afford correct rules for the assessment of the plaintiff's damages in the case at bar.

The legal effect of the contract sued on, as has been seen, was that the defendant promised to pay the plaintiff certain wages, and to furnish him with certain supplies, so long, at least, as his disability to work should continue; and the consideration of these promises of the defendant was the plaintiff's agreement to do for the defendant such work as he was able to do, and his release of the defendant from all liability in damages for the personal injuries which had caused his disability.

The complaint alleged, and the plaintiff at the trial introduced evidence tending to prove, that by those injuries he was permanently disabled; that he was always ready and offered to do for the defendant such work as he was able to do, and labored at that work for such reasonable time as he was able to work and bound to work under the contract; and that the defendant, without any reasonable ground therefor, denied its obligation to pay the plaintiff the stipulated wages longer than suited its pleasure, and, for six months before the commencement of the action, disregarded the contract, and refused to abide by it, and entirely abandoned the contract, and dismissed the plaintiff from its services.

If these facts were proved to the satisfaction of the jury, the case would stand thus: The defendant committed an absolute breach of the contract, at a time when the plaintiff was entitled to require performance. The plaintiff was not bound to wait to see if the defendant would change its decision, and take him back into its service; or to resort to successive actions for damages from time to time; or to leave the whole of his damages to be recovered by his personal representative after his death. But he had the right to elect to treat the contract as absolutely and finally broken by the defendant; to maintain this action, once for all, as for a total breach of the entire contract; and to recover all that he would have received in the future, as well as in the past, if the contract had been kept. In so doing, he would simply recover the value of the contract to him at the time of the breach, including all the damages, past or future, resulting from the total breach of the contract. The difficulty and uncertainty of estimating damages that the plaintiff may suffer in the future is no greater in this action of contract, than they would have been if he had sued the defendant, in an action of tort, to recover damages for the personal injuries sustained in its service, instead of settling and releasing those damages by the contract now sued on.

In assessing the plaintiff's damages, deduction should, of course, be made of any sum that the plaintiff might have earned in the past or might earn in the future, as well as the amount of any loss that the defendant had sustained by the loss of the plaintiff's services without the defendant's fault. And such deduction was provided for in the instruction asked by the plaintiff and refused by the judge.

The questions of law presented by the defendant's bill of exceptions, allowed by the Circuit Court of the United States, are substantially like those above considered, and require no further notice.

The result is, that the judgment of the Circuit Court of Appeals, sustaining the demurrer to the complaint, and reversing the judgment of the Circuit Court of the United States, must be reversed; that the judgment of the Circuit Court of the

United States must also be reversed, because of the ruling excepted to by the plaintiff; and that the case must be remanded to that court, with directions to set aside the verdict and to order a new trial.

Judgments of the Circuit Court of Appeals and of the Circuit Court of the United States reversed, and case remanded to said Circuit Court for further proceedings in conformity with the opinion of this court.